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CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY AND THE DEPARTMENT OF JUSTICE

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CONFIRMATION HEARING ON:

PAULINE NEWMAN AND JAMES HARVIE WILKINSON III

WEDNESDAY, FEBRUARY 22, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 4:35 p.m., Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Vinton DeVane Lide, chief counsel and staff director; and Robert J. Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today, the Senate Judiciary Committee is considering two nominations: Dr. Pauline Newman, to be a U.S. circuit judge for the Federal circuit; and Mr. James Harvie Wilkinson, to be a U.S. circuit judge for the fourth circuit.

The Judiciary Committee held a hearing on Mr. Wilkinson's nomination on November 16, 1983. At that time, Mr. Wilkinson was questioned on a variety of subjects and did a very creditable job of answering those questions.

However, shortly after the hearings, several groups contacted me and requested a chance to have their views regarding Mr. Wilkinson's nomination made known in a public forum.

In deference to these groups, the committee has extended the hearing on Mr. Wilkinson's nomination for a second day. The individuals wishing to testify on Mr. Wilkinson's nomination will have an opportunity to express themselves today, and Mr. Wilkinson will be given an opportunity to respond.

The committee will now consider the nomination of Dr. Pauline Newman, to be a U.S. circuit judge for the Federal circuit. Senator Heinz and Senator Specter, I understand, both endorse this nominee, and Senator Heinz, I know, is here today and we would be very pleased to hear from him at this time.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, thank you very much. I am honored to come before your Judiciary Committee, and indeed I am very pleased to join with my distinguished colleague, Senator Specter, in recommending and introducing a Pennsylvanian who is the administration's nominee for the U.S. Court of Appeals Federal Circuit. May I say I am delighted with the choice.

Unfortunately, Senator Specter had to go to Philadelphia with the Vice President a few moments ago. He had intended to be here and I anticipate that he will want to submit some remarks for the record, and I have asked his staff to give any such remarks if they would like me to submit them at this time.

Let me begin, Mr. Chairman, by expressing my undivided and wholehearted support for Dr. Pauline Newman. In my opinion, she is uniquely qualified to serve our country as a Federal judge on this particular court.

The highly specialized nature of the recently created Court of Appeals for the Federal Circuit requires an individual to have a depth of knowledge and proficiency in patent, copyright and trademark law.

As you become more familiar with Dr. Newman's background, you will realize, as I have, what a superbly skilled candidate she is. Dr. Newman began her professional career as a chemist, and, after passing her bar examinations, embarked on a very distinguished legal career in patent, trademark, copyright and licensing law that spans the last 25 years.

She has been recognized by her peers in the legal community for work as a specialist on patent, trademark and copyright matters for the American Bar Association and as a member of the Board of Directors of the American Chemical Society. May I add that in that same capacity, Dr. Newman has contributed to the U.S. Trademark Association, the American Patent Law Association and the International Patent and Trademark Association.

Mr. Chairman, I also think something ought to be said on behalf of Dr. Newman's commitment to the quality of life in her community. Her commitment to our country does not end with her working day.

She has incorporated into her responsibilities service on the State Department Advisory Board on International Intellectual Property, the Advisory Committee to the Domestic Policy Review of Industrial Innovation, as well as the Special Advisory Committee on Patent Office Procedures and Practice.

She was a member of the United Nations Scientific, Educational and Cultural Organization, and still finds time to serve on the National Board of the Medical College of Pennsylvania, which is an extraordinarily fine institution.

Without question, I hope the committee will agree with me, and I am sure you will, that she is a candidate, a person of character, integrity, commitment and intelligence that would be a noteworthy addition to our federal judiciary.

The CHAIRMAN. Thank you very much, Senator. We are very pleased to have you here and she is very fortunate to have the endorsement of such an outstanding Senator. I regret that Senator Specter cannot be here, but I understand that he also endorses her. Is that right, Senator?

Senator HEINZ. Mr. Chairman, that is entirely correct. Senator Specter is a very strong supporter of Dr. Newman's appointment.

The CHAIRMAN. Dr. Newman, if you will stand up, I will swear you in.

Do you solemnly swear that the evidence you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. **Newman**. Yes.

The **Chairman**. Now, do you have any members of your family here you would like to introduce?

Dr. **Newman**. No, I do not.

The **Chairman**. We have a biography of Dr. Newman that we will include in the record.

TESTIMONY OF PAULINE NEWMAN, NOMINEE, U.S. CIRCUIT JUDGE, FEDERAL CIRCUIT

The **Chairman**. I have a few questions I will propound to you.

Dr. Newman, you got your B.A. degree from Vassar College?

Dr. **Newman**. Yes.

The **Chairman**. And your M.A. degree from Columbia University?

Dr. **Newman**. Yes.

The **Chairman**. Your Ph.D. degree from Yale University?

Dr. **Newman**. Yes.

The **Chairman**. So you have tried them all.

Dr. **Newman**. I have tried them all.

The **Chairman**. How about the New York University School of Law? You got your LL.B. degree there in 1958. That is the last degree, your law degree?

Dr. **Newman**. That is the last.

The **Chairman**. So you are a scientist and a lawyer, too?

Dr. **Newman**. Yes.

The **Chairman**. In 1981, you testified before the committee's Subcommittee on Courts concerning the Federal Courts Improvement Act of 1981. Your testimony was in favor of the formation of the court of appeals for the Federal circuit. I believe that is correct, is it not?

Dr. **Newman**. Yes.

The **Chairman**. In 1982, you were admitted to practice in that court, is that right?

Dr. **Newman**. That is correct.

The **Chairman**. And now in 1984, you have been nominated to become a Federal judge for that court. Given this unique background, can you offer any suggestions to this committee on any area of the court which you feel needs improvement?

Dr. **Newman**. Mr. Chairman, when I testified in 1981 in favor of that court, my hope, my expectation was that it would be possible to stem the continuing weakening of patents as an incentive toward industrial innovation.

Now that the court has been functioning for close to 2 years, it has surpassed the expectations of all of us in its role as a force for strength in our industrial community. With that background and from the outside, I have no recommendations of substance that would improve the powerful impact that the court has already made.

The **Chairman**. Maybe after you have been on the court for some several years, you may then have some recommendations you would care to make, and feel free to make those to us.

Dr. **Newman**. Thank you; I shall.

The **Chairman**. Dr. Newman, you have a rather extensive background involving patents and trademark law and have written numerous articles on the subject. Do you feel that this experience can be of particular significance to the court at this time, and if so, why?

Dr. **Newman**. I do indeed, Mr. Chairman. My experience throughout my career has been in technology-based industry. The specialities of patent and trademark law relate directly to about half of the court's work.

These are very complex fields of law and I have been specializing in them for a long time. I believe and hope, recognizing that it is technology that makes these legal actions so complex, that I will indeed have an opportunity to contribute to this court and the development of the law.

The **Chairman**. Dr. Newman, the Court of Appeals for the Federal Circuit is responsible for hearing patent appeals from all Federal district courts. It would hear appeals in suits against the government for damages or refunds of Federal taxes, appeals from the Court of International Trade, appeals from the Patent and Trademark Office, and other such agency review cases.

This court, needless to say, is an extremely busy and important one. The workload is great and there are only 12 judges to hear cases. What actions will you take as a judge to ensure that the docket is current, yet the required quality of appropriate judicial review is maintained?

Dr. **Newman**. Mr. Chairman, I have always worked hard and long; it is my nature. I have always demanded excellence, or an approach to it, of myself. This court has set for itself extremely rigorous standards. I intend to make every effort to meet those standards and to maintain them.

The **Chairman**. You do not have a family; I believe you are single.

Dr. **Newman**. That is right.

The **Chairman**. So, that will enable you to give more time to the court, will it not?

Dr. **Newman**. Perhaps.

The **Chairman**. Dr. Newman, in answering the portion of the committee's questionnaire relative to judicial activism, you stated:

> The public interest lies in the fair resolution of disputes and the consistent application of the law. The role of the judicial branch is to apply the law in accordance with the intent of the lawmakers and not to seek to achieve personal policy goals through adjudication.

I want to commend you for that statement.

Now, Dr. Newman, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Dr. NEWMAN. Mr. Chairman, activism of that sort is exactly what has, in my opinion, damaged the patent system to a significant extent.

I know that judges must provide for normal evolution of the law; that is the common law tradition. But, to me, a decision contrary to established precedent can only generate fresh litigation, and meanwhile produce the uncertainty and unpredictability that led to the need for the court of appeals for the Federal circuit in the first place.

The CHAIRMAN. Thank you very much. I believe that is all the questions I have and I want to take this opportunity to wish you a happy and successful tenure on the Federal bench.

Dr. NEWMAN. Thank you, Mr. Chairman.

The CHAIRMAN. We will now excuse you and you can stay, if you wish, for the next nominee or you can leave, whichever you prefer.

The next nomination is that of Mr. James Harvie Wilkinson III, if you will come around, Mr. Wilkinson. Mr. Wilkinson, I guess I might as well swear you first, if you will stand up and be sworn.

Do you solemnly swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. WILKINSON. I do.

The CHAIRMAN. Mr. Wilkinson's record shows that he will bring to the Federal appellate bench a variety of experiences. He has been an outstanding teacher at one of the Nation's foremost law schools, where he taught constitutional law and criminal procedure and Federal courts.

He has been a prolific writer of legal books and articles, principally in the field of constitutional law. He was a law clerk for two terms to Supreme Court Justice Lewis F. Powell, Jr.

As a Deputy Assistant Attorney General of the United States, Mr. Wilkinson supervised the motions, briefs, pleadings, and correspondence of some 50 litigating attorneys in the Department of Justice.

A recent editorial from the Baltimore Sun warmly supports Mr. Wilkinson's nomination. The editorial notes that, "In his writings, he displays what we would describe as a moderate Virginian view of racial rights and wrongs and remedies that we can always respect, regardless of whether we agree with him."

Letters commending the nominee to this committee have recently been received from Richard A. Merrill, dean of the University of Virginia Law School; Walter Horsely, immediate past president of the Virginia State Bar; and Lewis F. Powell III, a Richmond attorney. They speak of the nominee as a man of exceptional talents and qualifications.

Without objection, these letters will be included in the record at this point.

[Material submitted for the record follows:]

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE-VIRGINIA-22901
SCHOOL OF LAW

OFFICE OF THE DEAN

February 16, 1984

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C.

Dear Senator Thurmond:

My purpose in writing is to support the President's nomination of my colleague, J. Harvie Wilkinson, III, for appointment to the United States Court of Appeals for the Fourth Circuit, and to share a perspective that may be helpful to you and other members of the Judiciary Committee.

I warmly endorse Jay Wilkinson's nomination, I also contemplate his departure from this faculty with deep personal regret. Jay has been a dedicated and respected teacher and legal scholar here for the past decade, and his departure will leave a cap that we cannot soon fill. In addition to performing the central functions of a legal academic--teaching and scholarship--with distinction, Jay has played a unique role in the governance of the institution and in the lives of students.

Since his appointment to our faculty in 1973, Jay Wilkinson has ranked among our best teachers. His courses are regularly oversubscribed, and his classes draw praise from students of all abilities and every political persuasion. Jay is noted for a graceful and entertaining style, but also for a willingness to reexamine legal issues and consider on the merits views that diverge from his own. I have never heard a student accuse Wilkinson of attempting to indoctrinate, and many have praised his openness and balance even on issues where they disagree.

Jay Wilkinson enjoyed such remarkable early success as a teacher that in 1975 the Board of Trustees of the Alumni Association made him the first recipient of its now annual award for the University's outstanding young teacher. He is the only member of the law faculty ever to earn this award. Two years later, the University's IMP Society, a group consisting primarily of students, conferred on Jay its annual award to the faculty member who has made the most important contributions to the University community. This past fall Jay was the only member of our faculty elected to the local chapter of Phi Delta Phi, an honorary legal fraternity.

As the Committee knows well, Jay Wilkinson has been a prolific scholar and writer on legal issues since his entry into the profession. His writings have earned him the respect of his colleagues here and the respect of Constitutional law scholars throughout the country. I would not pretend, nor would Jay, that his writings have invariably elicited agreement, but they have been greeted as the work of an able, serious, and open-minded student of Constitutional law.

I could not begin to list all of the Law School and University commitees on which Jay Wilkinson has served. His balance and objectivity have made him a frequent target for "extra duties. Jay's abilities were first enlisted on behalf of the University by former Governor Holton, who appointed him to the Board of Visitors in 1970. He served, as the Board's youngest member, until 1973. Later President Frank Hereford appointed Jay to chair a University-wide committee to evaluate our widely-publicized and controversial Easters Weekend--one of the most contentious, though by no means the most important, assignments Jay has undertaken here.

President Reagan has made a splendid choice in nominating Jay Wilkinson for the Court of Appeals. I am aware of the suggestions that he lacks experience in legal practice, specifically in litigation, and I do not disagree that such experience would be useful. However, as one who has practiced with a major firm (Covington & Burling) and administered a government legal office (FDS's, from 1975 to 1977), I am unconvinced that such experience is essential. In my view, the essential ingredients for effective judicial service are those qualities of seriousness, openness, and concern for others that Jay Wilkinson has exhibited through his legal career.

It is thus with real conviction, if personal regret, that I support Jay Wilkinson's nomination and I urge your recommendation of its approval by the Senate.

Sincerely yours,

Richard A. Merrill

Richard A. Merrill
Dean

RAM:csm

HUNTON & WILLIAMS
707 EAST MAIN STREET P. O. BOX 1535
RICHMOND, VIRGINIA 23212
TELEPHONE 804 - 788 - 8200
TWX - 710 - 956 - 0061

February 15, 1984

The Honorable Strom Thurmond
c/o Duke Short
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Re: Nomination of J. Harvie Wilkinson, III to the United States Court of Appeals for the Fourth Circuit

Dear Mr. Chairman:

I am a senior partner in the Richmond, Virginia office of Hunton & Williams and the Immediate Past President of the Virginia State Bar. I write today as an individual lawyer in private practice who supports the nomination of J. Harvie Wilkinson, III to fill the vacancy created by the transition to senior status of the Honorable John D. Butzner, Jr. of the United States Court of Appeals for the Fourth Circuit.

I urge the Committee to confirm Professor Wilkinson's appointment to the vacancy on the Fourth Circuit bench. From my own personal knowledge, I can attest to his high standing in his home community for honesty, intelligence, integrity and courage. As I approach my own 25th anniversary at the bar, I am grateful indeed that people with such mental acuity and inner strength continue to be attracted to the legal profession in this country, and particularly that someone as able as Professor Wilkinson now offers himself for public service as an appellate judge in our federal courts.

Over the last eight years, I have been actively involved in the regulation of lawyers and improving their competence in the Commonwealth of Virginia. The Virginia State Bar now has over 17,000 members, and ranks tenth in size in the United States. A state agency that traditionally does not take formal positions in the nominating process for federal judges, its members are vitally concerned with improving the administration of justice throughout the United States.

In 1976, I volunteered to represent Richmond-area lawyers on the Council of the Virginia State Bar. In my first assignment, I was named to a Special Committee on Evaluation and Long-Range Planning and subsequently became its reporter. In compiling that Report, I was struck then, as I am now, with the first paragraph of the Preamble to the

1969 version of the American Bar Association's Code of Professional Responsibility, which reads as follows:

> "The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible."

This is the charge given to those who practice law in our courts and tribunals. How much more relevant it is to those who offer themselves to serve as a judge in our system of justice. In my judgment, Professor Wilkinson is exceptionally well qualified for this all important task.

During my term as President-Elect and then as President of the Virginia State Bar, I was privileged to attend the Judicial Conference for the Fourth Circuit and to participate with the judges, trial lawyers and others invited to those conferences in discussions of matters of mutual interest to those who would assume the awesome responsibility of "guardians of the law." Preamble, ABA Code of Professional Responsibility 1 (1969). Both bench and bar were actively concerned about reforms in such areas as improving access to the courts, controlling litigation costs and delays, and enhancing professional competence. We need our best minds and our most conscientious workers to help improve the workings of the system from within. With his proven industriousness, Professor Wilkinson will be able to add his keen insight to the furtherance of court reforms in the public interest.

I was also privileged to be invited to serve in the recent past in another role that supports my unqualified endorsement of Professor Wilkinson for the Fourth Circuit vacancy. Over a period of several months in 1979 and 1980, I served on the Search Committee for a new Dean for the University of Virginia Law School. Although Professor Wilkinson was not a candidate at the time, I had a unique opportunity to visit with the faculty at that law school and to see portrayed in biography and commendation many of the leading legal scholars then in residence or at other law schools throughout the country. Indeed, included among the candidates screened were members of the federal appellate bench.

That experience gave me a special insight into the standards of intellectual excellence, integrity and accomplishment set for full-time faculty members at that law school, and the special enhancement sought for the one who would be their Dean. The fact that Professor Wilkinson's return to the faculty last Fall was so eagerly awaited by the Dean and faculty of the Law School has independent significance that speaks for itself.

I offer the foregoing narrative to the Committee, expecting others to catalog in detail their familiarity with those special qualities most ardently sought in a federal appellate judge. My own endorsement of Professor Wilkinson's nomination embraces, without qualification, those characteristics summarized in Canon 34 of the American Bar Association's Canons of Judicial Ethics (1924):

> "In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to the law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."

I join with all those in Virginia who are proud to offer our best for service to this country as a federal appellate judge: seeking to administer justice fairly to all, in the highest traditions of those great Virginians who have preceded him on the federal bench; and ask that these remarks be made a part of the record of the Committee's consideration of this nomination.

Respectfully,

Waller H Horsley

Waller H. Horsley

WHH/bar

HUNTON & WILLIAMS
707 EAST MAIN STREET P. O. BOX 1535
RICHMOND, VIRGINIA 23212
TELEPHONE 804 - 788 - 8200
TWX - 710 - 956 - 0061

February 15, 1984

Senator Strom Thurmond
c/o Duke Short
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Jay Harvie Wilkinson

Dear Senator Thurmond:

Please accept my enclosed statement in support of the nomination of Jay Harvie Wilkinson, III to sit on the United States Court of Appeals for the Fourth Circuit. I understand that the Senate Judiciary Committee will conduct hearings on Mr. Wilkinson's nomination next Wednesday, February 22, 1984. I would be grateful if you would include my statement in the record of those hearings.

If I can provide you or any other member of the Committee with any additional information, please let me know.

Sincerely,

Lewis F. Powell, III /ro
Lewis F. Powell, III

234/816
Enclosure

STATEMENT OF LEWIS F. POWELL, III
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF J. HARVIE WILKINSON, III
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

February 15, 1984

Mr. Chairman, distinguished members of the Judiciary Committee, my name is Lewis F. Powell, III. I practice law at Hunton & Williams in Richmond. I am engaged in general civil litigation in state and federal court, and am a member of the Fourth Circuit Judicial Conference. I very much appreciate this opportunity to endorse the nomination of Jay Wilkinson to sit on the Fourth Circuit Court of Appeals.

I have known Jay Wilkinson personally for as long as I can remember. Moreover, I was fortunate enough to be taught Constitutional Law and Criminal Procedure by Mr. Wilkinson at the Virginia Law School. My endorsemet of Mr. Wilkinson is therefore based upon having known him all my life and having learned from him in the classroom. In addition, as a former district court clerk and a trial practitioner in the Fourth Circuit, I believe I have acquired some notion of the qualifications necessary for effective service on that Court. For the reasons that follow, I can recommend Jay Wilkinson to you without reservation.

No one, I suspect, will have any qualms about Jay Wilkinson's intellectual ability to serve effectively as an appellate judge. From his selection as a Scholar of the House at Yale, to his excellent academic performance at the Virginia Law School, to his service as a law clerk on the Supreme Court, to his publication of numerous learned books and articles, to his outstanding performance as a professor of law--Mr. Wilkinson has demonstrated a love of scholarship and a distinctive capacity to think and write with great clarity and persuasion. Confirmation of Mr. Wilkinson will carry forward the long and fine tradition in this nation of elevating our best legal minds to the appellate bench.

Mr. Wilkinson also possesses, in abundance, three qualities that are as essential as sheer intellect to effective service on the appellate bench. First and foremost, his personal integrity is absolutely above reproach. I would not hesitate to entrust him with responsibility for matters of great importance. Second, he has an abiding, even passionate, reverence for the Constitution, the Bill of Rights, and the Fourteenth Amendment. Not until I studied Constitutional Law under Jay Wilkinson did I fully appreciate that the fundamental purpose of the Bill of Rights and the Fourteenth Amendment is to protect the individual from the tyranny of the majority. Finally, Mr. Wilkinson has displayed, to me personally and in the classroom, all the ingredients of a sound judicial temperament. He approaches problems honestly, bound only to reach the result yielded by unflinching application of established legal principles.

I hope I may be permitted a final word about two criticisms that I suspect may surface before the Committee--that Mr. Wilkinson lacks sufficient experience to go on the appellate bench, and that he is "too conservative" and thus not acceptable to those who perceive a difference between their philosophy and his. The first criticism, though perhaps understandable, rests on perceived shortcomings that are more than compensated for by Mr. Wilkinson's overwhelming strengths. The second, in my judgment, is simply unfounded.

Regarding Mr. Wilkinson's experience, I respectfully submit to the Committee that he would bring a wealth of perspectives to the Court. Although he has not served as a trial judge or been engaged in trial practice, he has earned considerable recognition as a legal scholar. If you were to poll the faculty and alumni at the Virginia Law School and ask them to identify the leading professors of the last decade, Jay Wilkinson would surely be included by most, if not all, respondents. Moreover, as a law clerk, he assisted at the highest level in the development and application of our jurisprudence. As a newspaper editor, he had ample opportunity, from the outside looking in, to reflect and comment on the judicial system (among many other topics) and its daily impact on all of us. And as a Deputy Assistant Attorney General in the Civil Rights Division, he participated in the formulation and implementation of a significant aspect of the executive branch's efforts to promote equal opportunity for all our citizens.

In short, Mr. Wilkinson has a breadth of experience that should enable him to add considerable luster to an already illustrious Court. From my perspective as a practitioner, it matters a great deal less to me that a nominee for an appellate court have extensive experience on the bench or at the bar than it does that he or she possess the other qualities of which Jay Wilkinson has such an abundance.

The second criticism, which I believe to be unfounded, probably results from a combination of Mr. Wilkinson's background and the necessity felt by some to characterize judicial nominees as "liberal," "conservative," "strict constructionist," or whatever. Such labels serve only convenience, and their convenience frustrates thoughtful evaluation of a nominee's credentials. In my view, Jay Wilkinson defies easy labelling, and that is how it should be.

A good judge should not fit neatly into an ideological pigeonhole. A good judge should approach each case anew, without preconceived notions as to the result, determined only to decide the case in a principled fashion. This simple axiom was the cornerstone of Jay Wilkinson's classroom treatment of Constitutional Law and Criminal Procedure. He insisted that we analyze each case with that precept in mind, and, with one significant exception, he was relentlessly critical of courts that deviated from principled adjudication, regardless of the result.

For the benefit of those who, in particular, have reservations about Jay Wilkinson's commitment to civil rights, I think you will be interested in the "exception" mentioned above. It was his treatment of the Supreme Court's 1954 decision in Brown v. Board of Education.

Constitutional scholars, who for the most part seem unable to reach any consensus with respect to significant decisions, generally agree that Brown is a remarkable example of undisciplined (some would say unprincipled) adjudication that was nonetheless clearly correct on the merits. Chief Justice Warren's brief opinion--it was only 11 pages--for the unanimous Court in Brown is, in essence, more a statement of fundamental moral and social policy than a carefully structured application of the Equal Protection Clause. The Brown opinion, therefore, should have been a vulnerable target for Professor Wilkinson's criticism of result-oriented decisionmaking.

For Jay Wilkinson, however, Brown was different, and markedly so. Although at first he challenged us to analyze the opinion critically and to search for the customary indicia of principled adjudication (of which there were very few), he led us by the end of the class to the firm conviction that not merely the result in Brown, but also the manner in which it was reached, was correct and necessary. Brown, in Mr. Wilkinson's view, presented the Court, and through it the nation, with an unprecedented opportunity to terminate with the stroke of a pen three centuries of inequity. I very much doubt that anyone leaving Mr. Wilkinson's classroom that morning had any misgivings about his philosophical commitment to equal protection for all of our citizens.

If any doubters remain, I would respectfully direct them to page 62 of Jay Wilkinson's book on the Supreme Court and school desegregation.1/ In words whose eloquence, much like that of Brown, lies in their simplicity, Jay Wilkinson summed up his feelings about the Brown decision and its abiding importance for us all:

> No single decision has had more force than Brown; few struggles have been morally more significant than the one for racial integration of American life.

Thank you.

Respectfully submitted,

Lewis F. Powell, III
February 15, 1984

1/ J. Wilkinson, From Brown to Bakke: The Supreme Court and School Integration, 1954-1978 (1979).

The **Chairman**. Now, Mr. Wilkinson, we will be ready to hear from you in a few minutes. I think there is some opposition to you, so we will hear that opposition and then give you a chance to answer the points raised.

So if you have a pencil and a piece of paper, if you want to make note of the points they bring out, then you will have a chance to rebut those points.

Mr. **Wilkinson**. Thank you, Mr. Chairman.

The **Chairman**. Now, you can just sit back there, if you want to, while these witnesses come up.

Now, without objection, we will place Mr. Wilkinson's biography into the record.

I might state that Mr. Wilkinson is married and has two children. He received his B.A. degree from Yale University, his J.D. degree from the University of Virginia.

Now, the various witnesses who are opposing Mr. Wilkinson can all be sworn at one time, I think, to save time. I believe these are the witnesses, if you will just stand as I call your names and I will swear you all in at once: Elaine R. Jones, assistant counsel, NAACP Legal Defense and Educational Fund; Arnoldo S. Torres, national executive director, League of United Latin American Citizens; Richard P. Fajardo, acting associate counsel, Mexican American Legal Defense and Educational Fund; Jack W. Gravely, executive secretary, NAACP, Virginia State Conference, Inc.; C. Lyndon Harrell, Jr., legislation and advocacy, Mobility on Wheels; Bobby B. Stafford, president, Old Dominion Bar Association; Robert Jefferson Roehr, president, Capitol Area Republicans; Pat Winton, National Organization for Women, Virginia.

Where is she?

Ms. **Harrison**. She is not here; I am taking her place.

The **Chairman**. You are taking her place?

Ms. **Harrison**. I am representing two organizations.

The **Chairman**. How is that?

Ms. **Harrison**. I am Edythe Harrison and I am representing the National Women's Political Caucus and the National Organization for Women.

The **Chairman**. Ms. Winton is not here?

Ms. **Harrison**. Correct.

The **Chairman**. And you are taking her place?

Ms. **Harrison**. Yes.

The **Chairman**. Edythe Harrison, National Women's Political Caucus of Virginia; so you are representing both of those organizations?

Ms. **Harrison**. Yes.

The **Chairman**. Thomas DePriest, Virginia Gay Alliance; Armand Derfner, attorney.

Now, I will swear you all, if you will hold up your right hands. The evidence you give in this hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Ms. **Jones**. Yes.

Mr. **Trevino**. Yes.

Ms. **Gonzales**. Yes.

Mr. **Gravely**. Yes.

Mr. **Harrell**. Yes.

Mr. **Stafford**. Yes.

Mr. **Roehr**. Yes.

Ms. **Harrison**. Yes.

Mr. **DePriest**. Yes.

Mr. **Derfner**. Yes.

The **Chairman**. Now, on account of the large number of witnesses, we are going to have to limit the time. Let us see; it is 5 o'clock now. We are going to have to limit the witnesses to 5 minutes each. Now, we will put your statements in the record, if you want to put the whole statement in, but then just tell us offhand in 5 minutes anything you wish to say.

Generally, in 5 minutes, you can say a whole lot, but if you want to say more than that, just hand it to the reporter here and we will put it in the record.

Now, the first panel will come forward, and that is: Elaine R. Jones, Arnoldo S. Torres, Richard P. Fajardo, Jack W. Gravely and C. Lyndon Harrell, Jr., if you will all come up to the table here. You may just pull up more chairs there if you need them.

Now, Ms. Jones, do you want to go first?

Ms. **Jones**. Mr. Trevino wants to go first, Senator.

The **Chairman**. How is that?

Ms. **Jones**. Mr. Trevino wants to go first and I will yield to the gentleman.

The **Chairman**. All right. Go ahead.

STATEMENT OF JOSEPH MICHAEL TREVINO, DIRECTOR OF LEGISLATION, LEAGUE OF UNITED LATIN AMERICAN CITIZENS

Mr. **Trevino**. My name is Joseph Michael Trevino. I am here on behalf of the League of United Latin American Citizens, on behalf of Mr. Arnold Torres, the executive director. I am director of legislation.

Good afternoon, Mr. Chairman, distinguished Members of the Senate. First, I would like to thank you on behalf of the league for giving us this opportunity of presenting testimony today.

The league is the oldest and largest Hispanic membership organization in the country, with 100,000 members in 43 States. Mr. Chairman, let me begin by stating the league's interest in the certification process is long-standing and in keeping both with the responsibilities of an informed citizenry and advocating for an independent judiciary which administers the law in a fair, evenhanded, and effective manner.

Speaking about the judiciary system in this, our country, brings to mind a conversation I had with Jim Range, formerly legislative director for Senator Howard Baker. Mr. Range recounted to me some conversations he had had with persons whom he encountered while traveling abroad.

Mr. Range was surprised to hear that the one aspect of American life which was most respected and admired, in fact, was the U.S. judicial system, which in their minds was and continues to be free, independent and, above all, just. We, at LULAC, actively support and advocate for a free and independent, just judiciary.

As suggested, Mr. Chairman, because time is brief, I will ask that the full text of my testimony and attachments be incorporated into the record, and I will be brief and give you a summary of the major points.

We oppose, and would hope that this body rejects the nomination of Mr. J. Harvie Wilkinson. Mr. Wilkinson is guilty of intellectual dishonesty. While the nominee was editor of the editorial page of the Virginian-Pilot during 1979 through 1981, a public debate ensued regarding the selection of judges for four newly created Federal judgeships.

The conclusion of many of those editorials was that the secrecy of the whole process darkens public distrust, while certainly that is not applicable here because we do have the opportunity for public views, for which we are quite thankful.

Of particular interest of those editorials is one entitled "Choosing Judges on Merit." This editorial supported the notion of a judicial nominations commission, in the hope that, "the commission will provide a high-grade and less political review of the character, temperament, intelligence, mental and physical fitness, education, legal ability, experience, general interest and past conduct of each person considered."

Were we to hold Mr. Wilkinson to that same standard, I suggest that he would not meet any of those criteria. Mr. Wilkinson does not have any significant or noteworthy advocacy experience which could compensate for not meeting the American Bar Association's minimum of 12 years' post law school experience for judgeship nominees.

While Mr. Wilkinson is an author and editor for the editorial page, neither of these literary experiences could be construed to compensate for the absence of evidenciary, procedural, trial or advocacy experience. At best, his literary interest, as reflected in the editorials, is one opposing present-day social problems and criticizing the government and courts for implementing alternative solutions, where he has not supported one solution over another, much less posed an alternative himself.

Of the editorials attributed to Mr. Wilkinson during his tenure at the Virginian-Pilot which were researched, the one entitled "Capital Punishment is Necessary" is particularly troubling to us.

Mr. Wilkinson supports capital punishment on the basis that, "I just do not trust parole agencies." The nominee supports capital punishment and questions whether the irreversible penalty serves as a deterrent. His response is, "Maybe it does and maybe it does not, but let us give at least the innocent the benefit of this doubt."

Despite many of the cites that I have here, there are certain quotes from the Congressional Record of the recent debate on the death penalty. There have been many studies that indicate that in the States that do not have the death penalty, they have a lower percentage of murder rates in those States than States that do have the death penalty.

We are particularly concerned, as the Bureau of Justice Statistics reports that for all of calendar year 1982, about half the 64 persons who left death row by means other than death had both their convictions and their sentences vacated.

Additionally, we have a particular concern because, of the 1,267 persons that are on death row today, 66 of them are Hispanic.

Finally, from LULAC's perspective——

The **Chairman**. I believe your time is up. We will just place the rest in the record.

Mr. **Trevino**. Thank you, sir.

The **Chairman**. Thank you very much.

[Material submitted for the record follows:]

PREPARED STATEMENT OF JOSEPH MICHAEL TREVINO

Good afternoon, Mr. Chairman, distinguished members of the Senate. First, I would like to thank you on behalf of the League of United Latin American Citizens (LULAC) for allowing me, Joseph Michael Trevino, LULAC Legislative Director, to present our views regarding the judiciary generally and Mr. J. Harvie Wilkinson's nomination to the 4th Circuit Court in particular. LULAC is the oldest and largest Hispanic organization with a membership of over 100,000 members in 43 states recently established councils in Mexico, Central America, West Germany, and Okinawa. Founded in Corpus Christi, Texas, LULAC's central concerns are for full social, political, economic, and educational rights for Hispanics in the United States.

Mr. Chairman, let me begin by stating that the League's interest in the certification process is longstanding and in keeping both with the responsibilities of an informed citizenry and advocating for an independent judiciary which administers the law in a fair, evenhanded and effective manner. Speaking about the judiciary system in this, our country, brings to mind a conversation I had with Mr. Jim Range, formerly legislative director for Senator Howard Baker. Mr. Range recounted to me conversations he had had with persons whom he encountered while traveling abroad. Mr. Range was surprised to hear that the one aspect of American life which was most respected and was admired in fact the U. S. judicial system, which in their mind was and continues to be free, independent, and above all, just. We, at LULAC, actively support and advocate for a free, independent and just judiciary.

Regarding Mr. J. Harvie Wilkinson's nomination to the bench for the 4th Circuit Court, LULAC urges this body to reject his nomination on the following grounds:

Mr. Wilkinson is guilty of "intellectual dishonesty." while the nominee was editor of the editorial page of the Virginian-

Pilot during 1979 through 1981 a public debate ensued regarding the selection of judges for four newly created federal judgeships. It can be assumed that the editorials published during that time carried the approval of the nominee. Several editorials referring to the then present day procedure for selecting judgeships were published (attachments 1, 2, & 3).

Among the conclusions reached by these editorials was the fact that "the secrecy of the whole process darkens public distrust." (attachment 1) But of particular interest is the editorial entitled "Choosing Judges on Merit" (attachment 2). This editorial supported the notion of a Judicial Nominations Commission in the hope "that the Commission will provide a high-grade and less political review of 'the character, temperament, intelligence, mental and physical fitness, education, legal ability, experience, general interest, and past conduct of each person considered."

Were we to hold Mr. Wilkinson to the same standard the editorial suggested, we must conclude that the nominee does not meet those standards. For example, with respect to the criterion of experience Mr. Wilkinson does not nearly meet the level of experience which most nominees to the appellate level bench. Mr. Wilkinson does not have any significant or noteworthy advocacy experience which could compensate for not meeting the American Bar Association's minimum of 12 years post-law school experience for judgeship nominees. While Mr. Wilkinson is an author and editor for the editorial page, neither of these literary experiences could be construed to compensate for the absence of evidentiary, procedureal, trial or advocacy experience. At best, his literary interest, as reflected in the editorials, is one of posing present day social problems and criticizing the government and courts for implementing alternatives and solutions where he has not supported one solution over another, much less pose an alternative himself.

With respect to his character, Mr. Wilkinson's activities

IN PURSUIT OF HIS SELF-INTEREST CAST A SHADOW OF DOUBT ON THIS MOST IMPORTANT OF JUDICIAL TRAITS. FOR EXAMPLE, MR. WILKINSON IN A PUBLISHED COMMENT ATTRIBUTED TO A VIRGINIA CONGRESSIONAL AIDE HAS "DONE EVERYTHING EXCEPT TAKE OUT BILLBOARDS AND AIRPLANES WITH STREAMERS." (ATTACHMENT 3). IF ACCURATE, THIS REPORT RAISES SERIOUS QUESTIONS ABOUT MR. WILKINSON'S PERCEPTION OF A FEDERAL APPELLATE LEVEL JUDGESHIP. LULAC ASKS, DOES THE NOMINEE PERCEIVE THE BENCH AS A POSITION TO BE LOBBIED FOR, OR ONE WHICH IS DESERVED ON THE BASIS OF MERIT?

OF ALL THE EDITORIALS ATTRIBUTED TO MR. WILKINSON DURING HIS TENURE AT THE VIRGINIAN-PILOT, WHICH WERE RESEARCHED, THE ONE ENTITLED "CAPITAL PUNISHMENT IS NECESSARY," APRIL 23, 1981 IS PARTICULARLY TROUBLING. MR. WILKINSON SUPPORTS CAPITAL PUNISHMENT ON THE BASIS THAT "I JUST DON'T TRUST PAROLE AGENCIES." (ATTACHMENT 4). THE NOMINEE SUPPORTS CAPITAL PUNISHMENT AND QUESTIONS WHETHER THIS IRREVERSIBLE PENALTY SERVES AS A DETERENT. HIS RESPONSE, "MAYBE IT DOES. AND MAYBE IT DOESN'T. BUT LET'S AT LEAST GIVE THE INNOCENT THE BENEFIT OF THIS DOUBT." MR. WILKINSON IS PREPARED TO SENTENCE PEOPLE TO DEATH DESPITE STUDIES WHICH INDICATE THAT THE MURDER RATE PER 100,000 POPULATION IN NON-DEATH PENALTY STATES HAS BEEN CONSISTENTLY LOWER BY ABOUT 100% THAN IN STATES WHICH HAVE THE DEATH PENALTY. (CONGRESSIONAL RECORD, FEBRUARY 9, 1984 AT S 1207 ATTACHMENT 5). ON THE GROUNDS THAT THE NOMINEE DISTRUSTS PAROLE AGENCIES, HE SUPPORTS CAPITAL PUNISHMENT DESPITE THE "BUREAU OF JUSTICE STATISTICS REPORTS THAT FOR ALL OF CALENDAR YEAR 1982, 'ABOUT HALF THE 64 PERSONS WHO LEFT DEATH ROW BY MEANS OTHER THAN DEATH HAD BOTH THEIR CONVICTIONS AND THEIR SENTENCES VACATED.'" (CONGRESSIONAL RECORD, FEBRUARY 9, 1984 AT S 1210 ATTACHMENT 6). GIVEN THIS EXAMPLE OF THE DANGER OF ERROR AND THAT ALMOST SIX PERCENT OR 66 OF THE 1276 MEN AND WOMEN ON DEATH ROW ARE HISPANICS, IT IS TROUBLING TO SEEK SUPPORT FOR A NOMINEE THAT HAS EXHIBITED A PRE-DISPOSITION OF OPTING FOR SUCH DIRE AND IRREVERSIBLE PUNISHMENT ON SUCH GROUNDS.

Finally, from LULAC's perspective and with respect to bi-lingual education, Mr. Wilkinson has displayed both ignorance and a callous disregard for the contribution of Hispanics both to this country's industrial development and military efforts. Mr. Wilkinson, in the editorial "Bilingual Madness," September 5, 1980, asks, "What feelings and loyalties will they [Spanish-Speaking Americans] develop toward a country whose dominant tongue many but dimly understand." (attachment 7). It seems Mr. Wilkinson is unaware that Hispanics have the highest number of Medal of Honor winners of any ethnic group in our country. Is Mr. Wilkinson unaware that during each of the major world conflicts it is the Mexican of yesterday who is the Hispanic-American of today that has and does work where most Americans wouldn't. Further, it seems that Mr. Wilkinson is unaware that the 1980 census report found that well over 75% of the Hispanic-American families claim English as the language spoken at home. Clearly, Mr. Wilkinson's opposition to bi-lingual education does not reflect a well informed nor well reasoned opinion, both skills considered pre-requisites to a judicial appointment.

In summary, Mr. Chairman, Mr. Wilkinson has, through his editorials, provided us a window into his mind. From our vantage point, Mr. Wilkinson is a bright man, but he lacks the advocacy experience which contributes to the overall requirements of an appellable level judge. While he must be given and fairly deserves credit for his accomplishments, LULAC questions why someone with Mr. Wilkinson's credentials has been chosen above other white males, minorities, and women who are qualified and should be considered by this committee?

In closing, it is LULAC's position that confirmation of this nominee would be tantamount to implementing on-the-job training at the federal appellate level bench.

Thank you.

Attachment 1

[From Norfolk Virginian-Pilot, Feb. 21, 1980]

CHANGE IT

The Virginia Senate has again voted to change the way we choose judges in Virginia. It's high time the House of Delegates followed suit.

"If it ain't broke, don't fix it" is the cry of those resisting change. But the Virginia system is broke—down to the last axle.

Who can honor a system so unblushingly political? Last year, two state legislators had their law partners, named to judgeships. A third dismissed the wishes of his city's bar to plump his old legislative sidekick on the circuit bench.

This year, Delegate Floyd Bagley of Prince William modestly offered himself for our state judiciary. In the present climate, who could begrudge the attempt?

Appointing judges gives lawyer-legislators the appearance of an edge in court. That cheats the opposing lawyer, his client, and the public. "I have a great deal of impact on who's going to be the judge from my district," admits state Senator Frederick Gray, D-Chester. Mr. Gray, a proponent of reform, insists that "the potential for political influence is far greater in the courts" than before state agencies.

The secrecy of the whole process darkens public distrust. Former Delegate Richard Hobson, D-Alexandria, once described the system as "I won't mess with your judge and you don't mess with mine."

No fewer than 175 judges are voted on each session. Confession of ignorance is commonplace. "Most of you [know] absolutely nothing" about the judges' real qualifications, argued Mr. Gray to his colleagues in last week's Senate debate.

Someone needs help; the Senate reform bill would provide it. It establishes a 15-member Judicial Nominations Commission to take evidence from local nominating committees and review the "character, temperament, intelligence, mental and physical fitness, education, legal ability, experience, general interest, and past conduct of each person considered," something for which the legislature now has precious little time.

True, the commission's recommendations (three for each new vacancy) would be non-binding on the legislature. But just show us the Honorable who would disdain this established screening process to place his crony on the bench.

The Senate reform would raise public respect for those who wear the robes and for those who fit them. It would buffer, but not eliminate, political influence on the Virginia judiciary.

Traditionally, the House Courts of Justice Committee is a graveyard for such thoughts. But Norfolk Delegate Tom Moss, who has opposed the bill in years past, has an open mind this time. So does Norfolk Delegate George Heilig, who nonetheless predicts the bill will "probably die, based on past history."

Pity. In a legislature with a far higher percentage of lawyers than any other in the country, the selection of judges should be beyond reproach.

Attachment 2

[From Norfolk Virginian-Pilot, Jan. 18, 1979]

CHOOSING JUDGES ON MERIT

At long last the Virginia Senate has passed legislation that may remove selection of local judges from the whims of local legislators. The bill now travels to the House of Delegates where, alas, its future is uncertain.

Senate debate on the bill was distinguished chiefly by the hypocrisy of its opposition. Senator William E. Fears, D-Accomack, lambasted the press for trying "to enter in the [judicial] selection process." That from the very same Honorable who persuaded the General Assembly to displace a competent sitting District Court judge with his own law partner.

Portsmouth Senator Willard J. Moody charged that bank presidents, insurance companies, and large corporations would be picking judges under the new bill, not the legislators who "know their local bar association members best." This from the very same gentleman who ignored the wishes of his own local bar association in appointing his old legislative sidekick, former Delegate Lester E. Schlitz, to a Portsmouth circuit judeship.

Back in 1949, the eminent Harvard political scientist V.O. Key Jr. condemned the Virgina judicial selection process as a means of "keeping the electoral machinery and other perquisites in Democratic hands in counties with Republican majorities."

Though the appointive powers of circuit judges have now been greatly restricted, the judiciary remains the foremost vestige of Democratic dominance in Virginia, the judgeship the political plum local legislators would least like to lose.

But to keep it they will pay a steep political price. No system can endure whose staunchest defenders perpetrate the boldest abuses. Or whose slipshod nature has now drawn the ire of detracting Democrats. Often, noted Norfolk Delegate Joseph Leafe last week, "we don't know who we are voting for or what their qualifications are." Richard Hobson, D-Alexandria, ironically described the system as "I won't mess with your judge and you don't mess with mine."

All this the merit selection bill is attempting to correct. It's neither perfect nor free of politics. The fifteen members of the state Judicial Nominations Commission will be appointed by the General Assembly, and the commission's recommendations can be overruled. Five of the fifteen members will be non-lawyers. Local committees will assist the commission in its work.

The commission's membership strikes us as rather large; its quality is as yet unknown. But the concept of the commission—not its amendable particulars—is the valued thing. The hope is that the commission will provide a high-grade and less political review of "the character, temperament, intelligence, mental and physical fitness, education, legal ability, experience, general interest, and past conduct of each person considered," something the legislature has precious little time for now.

Norfolk's Stanley Walker and Virginia Beach's Joe Canada were the only Tidewater Senators to support this bill. The rest would continue playing politics with the bench. Mr. Moody likes to assure us that "no state has any better judges than Virginia."

* * * * * * *

Mr. Byrd, at the president's behest, had named two "blue ribbon" lawyer-layman committees to choose candidates. Two lists produced and forwarded to the White House contained the names of ten white males.

Needled by women's and minority organizations because of the lack of female and non-white lawyers on the lists, the president wished the senator to make revisions. Mr. Byrd wasn't so inclined. As matters stand, Mr. Carter doesn't want to recommend Mr. Byrd's choices to the Senate for confirmation, and the Senate isn't likely, under custom of long standing, to cross a colleague.

Agitation to democratize the lists is not surprising. Equity aside, this administration—with the Senate's concurrence—will make the greatest wholesale selection of federal judges ever. The expansion of better than 30 percent from 495 judges to 647, will include 117 district judges and 35 new members of circuit benches. The appointments are for life, so disappointed aspirants would have to wait for attrition to take a toll. Yet the bar association took the correct position when it insisted, with Senator Byrd, that merit should rule judicial selections.

Virginia's lawmakers are in the process of electing judges, which means finding candidates the Democratic caucus is happy with. The method is essentially anointive, leading at times to conflicts among local interests.

* * * * * * *

Not that bar association recommendations control judicial elections. That condition has been demonstrated occasionally in regard to Norfolk judgeship appointments. It regrettably will be again when this legislature considers rival candidates put up by Portsmouth's bar association and that city's legislative delegation.

* * * * * * *

Barring utopian excellence in man that transcends law, politics and the bench can never be strangers. However, it is never too soon to begin stressing merit over connections, a departure that could usefully occupy Virginia's lawmakers at this session.

Attachment 3

[From the Norfolk Virginian-Pilot, Nov. 15, 1983]

J. HARVIE WILKINSON'S INCONSISTENCIES

(By Frederick Herman)

I have followed with some interest various news articles on the possibility of J. Harvie Wilkinson III's appointment to serve as a judge on the U.S. Court of Appeals for the 4th Circuit.

My curiosity was aroused by such comments as: "He's made phone calls, visited congressmen's offices and done everything except take out billboards and airplanes with streamers," which was attributed to a Virginia congressional aide.

I was also interested in reporter Margaret Edds' comments in her "Inside Virginia" column of Sept. 18, in which questions were raised as to the political overtones of the appointment; Mr. Wilkinson's conservative leanings; the president's failure to adequately consider members of minority groups for the post and, above all, the candidate's lack of experience in the courtroom.

The Standing Committee of the American Bar Association, which evaluates perspective nominees to federal courts, feels that such candidates should have "been admitted to the bar for at least 12 years." Obviously Mr. Wilkinson has considerably less legal experience even if one includes his stint as a professor of law at the University of Virginia. He would thus seem to fall short of the standard for a judgeship if non-political criteria were applied.

Mr. Wilkinson, however, faces another grave problem—his own words. For a number of years he was editor of The Virginian-Pilot and during his tenure the question of judicial appointments was raised. One must suppose that the editorials published at that time (1979-1981) carried Mr. Wilkinson's approval. These dealt with at least two of the issues raised in his own case—political influence and experience.

On Jan. 18, 1979, The Virginian-Pilot carried a long editorial, "Politics behind the robe," which, among other things, described the blatant political considerations involved in the selection of judges for four newly created federal judgeships and concluded that ". . . it is never too soon to begin stressing merit over connections. . . ." On Feb. 9, 1979, an editorial, "Choosing judges on merit," lambasted the highly politicized nature of selecting Virginia judges. Interestingly enough, the editorial quoted approvingly almost verbatim the evaluation criteria for appointment to state judgeships. We get more of the same call for selecting judges on merit and not politics on Feb. 21, 1980, "Change it," and on March 8, 1980, "Was it really racist?" The list goes on and on.

After reading all this, one must wonder about the consistency of Mr. Wilkinson's views. No one should detract from Mr. Wilkinson's many and varied abilities. He was an editor and is a law professor of distinction. He served ably, albeit very conservatively, as assistant attorney general in the office of Civil Rights in the Justice Department. He is young, energetic and certainly ambitious and eager to learn. In spite of all of this, he fails to meet his own stated criteria, as shown by the editorials published in The Virginian-Pilot during his tenure as editor, for an appointment to the federal bench.

Consistency might be a sign of a small mind, but principles one so firmly expressed should not be disregarded when opportunity knocks. Mr. Wilkinson would add to his own stature if he would be patient, acquire the experience he is lacking and then, in due time, become a candidate for a judgeship. At such time his candidacy would not be tainted by questions of politics, failure to meet all of the American Bar Association's criteria and his own inconsistencies—while his other achievements would be fully recognized.

Mr. Herman is an architect in Norfolk.

Attachment 4

[From the Norfolk Virginian-Pilot, Apr. 23, 1981]

CAPITAL PUNISHMENT IS NECESSARY

(By J. Harvie Wilkinson III)

So it has come to that. Sirhan Sirhan will probably be released in 1984.

That's right. The man who killed Robert Kennedy now stands three years from freedom.

A California official calls Sirhan "a model prisoner." The parole board promises to treat him like any other murderer, which means 16 years and out.

Attaboy, California. Flash assassins the green light. Sirhan plans to seek asylum in Libya, where veneration awaits.

That's one reason I support capital punishment. I just don't trust parole agencies.

Their thing is prison space not public safety. The plight of the prisoner looms before them. His next victim is namelessly abstract.

The single-file slaughter of hostages, the grisly headhunts for singers and presidents, the mass drowning of a family, the butchery of young blacks in Atlanta, the bombing of public places—violence has assumed new and vivid colorations even as the means of punishing it have paled.

In 1977, the Supreme Court implied that "the death penalty may be properly imposed only as to crimes resulting in the death of the victim."

Why should that be so? Does Hinckley deserve to live because his bullet strayed an inch from Reagan's heart? Why should Jim Brady's recovery spare his assailant's life?

Does capital punishment deter? Does the prospect of execution tame the thoughts of persons who would kill?

Maybe it does. And maybe it doesn't. But let's at least give the innocent the benefit of this doubt.

Opposition to capital punishment is rooted in nightmares of the Holocaust, the Stalinist purges, the noose, and the lynching bee—the ghastly litany of villainy visited upon innocent citizens by malignant mobs and states.

But the danger today has come to be the reverse: not that America will abuse the innocent, but that it will fail to protect them. Capital punishment is one means of protection: a guarantee that he who coldly takes one life will never take another.

The Hartford Courant argues that capital punishment "is almost always meted out only to the economically and educationally deprived in society."

Once that was true. Today, every indigent has at least one lawyer and two years of appeals. Today, crime is more discriminatory than punishment. The poor lack funds to purchase even relative safety. To me, equal justice means those who murder the children of Atlanta, no less than those who stalk presidents, deserve The Chair.

Opponents argue that capital punishment lowers society to the level of those it seeks to condemn.

Nonsense. Capital punishment reaffirms the sanctity of innocent life by imposing ultimate sanctions on the taking of it. It stands, says Justice Potter Stewart, as "an expression of society's moral outrage at particularly offensive conduct."

Critics claim capital punishment is irreversible. So are capital crimes.

Critics claim the death penalty is inhumane. So is imprisonment. Gary Gilmore and Steven Judy chose to die rather than face life imprisonment. How many others privately ponder that same choice?

I take no joy in this column. I respect those who disagree. I listen when a friend argues that retributive brands of justice are mean and obsolete. I don't want any brand of justice without strict safeguards and procedure.

I am sickened by capital punishment. The only thing that sickens me more are the heinous crimes that deserve it.

ATTACHMENT 5

> One way or another, the official choices—by prosecutors, judges, juries, and Governors—that divide those who are to die from those who are to live are on the whole not made, and cannot be made, under standards that are consistently meaningful and clear, but that they will continue to be made, under no standards at all or under pseudo-standards without discoverable meaning

Mr. President, I asked the Library of ngress to do a report on racial fac- s in the imposition of capital punishment in 1981. That report, which has already been made part of the RECORD, reviews a number of situations, a number of circumstances, as relates to who gets life and who gets death. But it shows that in an analysis of the data compiled by Bowers and Pierce, there is:

> A consistent pattern across all four States: Black killers, and the killers of whites, are more likely than white killers and the killers of blacks to receive the death penalty * * * their data shows that type of murder did not account for racial differences in the probability of receiving the death penalty. For both felony and nonfelony homicides the same differences by race of both offender and victim appeared.

And that is worth repeating because it shows a consistent pattern of the influence of race in the imposition of the death penalty. "Black killers, and the killers of whites, are more likely than white killers and the killers of blacks to receive the death penalty" in America and that is post-Furman, not pre-Furman.

Mr. President, another persuasive ason why the Senate should reject this attempt to reinstitute the death penalty is that capital punishment has not been proven to be an effective deterrent to crime. In fact, the death penalty may actually have a stimulating effect upon those deranged individuals who see it as a way of attracting attention to themselves.

Studies on the deterrent effect of the death penalty are nearly unanimous in finding that capital punishment acts as no greater deterrent than does life in prison. In fact, a comparison of the average murder rates in those States with the death penalty and those without it shows that the average murder rate in States with the death penalty is about twice as high as it is in the States without the death penalty.

I wish our friend from South Carolina was here to explain to us how it is that he can reach a conclusion that the death penalty deters when the statistics show year after year pre-Furman—post-Furman, that the murder rate in States that have the ith penalty is significantly higher an the murder rate in those States that do not have the death penalty.

I asked the Library of Congress to do a comparison for me using the FBI's uniform crime statistics and the capital punishment report released by the Bureau of Justice Statistics. In each of the 6 years examined, the Library of Congress researched States with capital punishment and without and came to the conclusion that States that have capital punishment have about twice as high an average murder rate than did the States without capital punishment.

Here are some of the figures:

In 1977, the murder rate per 100,000 population in death penalty States was about 10.9 percent. The murder rate per 100,000 population in nondeath penalty States was about 5.4 percent.

In 1978, the death penalty, the murder rate in death penalty States was 10.2 percent; in nondeath penalty States, 5.6 percent.

In 1979, the murder rate in death penalty States was 11.2 percent; in nondeath penalty States, 6.3 percent.

In 1980, the death penalty States had a murder rate of 11.4 percent; the nondeath penalty States had a murder rate of 6.6 percent.

In 1981, the death penalty States had a murder rate of 10.7 percent; the nondeath penalty States had a murder rate of 5.6 percent.

In 1982, the death penalty States had a murder rate of 10.3 percent and the nondeath penalty States had a murder rate of 5 percent.

When we put together the average over the last 6 years that are reflected in that chart we see that death penalty States have a murder rate of 10.78 percent whereas States without the death penalty have a murder rate of 5.75 percent.

Now that is about twice as high a murder rate in States that have the death penalty as in States that do not. And we have a chart in the back of this Chamber which graphically illustrates that difference, and for those who will consider voting for this bill because they believe capital punishment acts as a deterrent to homicides I hope they will look at the figures because the figures are persuasive that if anything there is a reverse relationship between capital punishment and the murder rate.

The States that have capital punishment, rather than deterring murders, have about twice as high a murder rate as the States that do not have capital punishment.

Mr. President, the issue again here today is not really whether we are in favor of or opposed to the death penalty. The issue today is whether we are going to stop debate after barely over a day's debate on a broad bill that provides the death penalty under many, many circumstances.

The New York Times in an editorial this morning wrote the following:

> A vote to cut off Senate debate on a death bill is scheduled for today. A vote against cloture will be a vote to keep talking—until after a recess and until the Senate can start sifting for sense instead of rushing for blood.

We are going to be voting to stop debate on a bill which, for instance, permits the death penalty to be imposed in circumstances where the defendant has not himself killed or attempted to kill or even intended that a killing take place or that lethal force be employed.

Can we as Members of a historic body which has protected the right to deliberative debate, spending a week on the question of withholding on interest and dividends, spending weeks on the gasoline tax, can we in good conscience as the repositories of tradition of this Senate which has allowed for deliberative debate on critical issues say that there has been adequate debate on a bill which permits the death penalty to be imposed in some circumstances where there has not even been an intent, an attempt to kill or intention to do great bodily harm? Does that rise to the dignity of the description of my friend from Illinois of supporting the death penalty within carefully prescribed limits?

I think not. I think we are entitled to significant debate on this bill before we vote on it. And then we must vote on it, because not only does it contain many specific provisions that are worthy of debate, but it also contains the fundamental choice of whether or not this society is willing to say that the death penalty deters, that the death penalty is in fact, an appropriate response of the State to a violent act by one of its citizens.

The Catholic bishops, in their statement on capital punishment, said the following:

> It is morally unsatisfactory and socially destructive for criminals to go unpunished. But the forms and limits of punishment must be determined by moral objectives which go beyond the mere inflicting of injury on the guilty. Thus, we would regard it as barbarous and inhumane for a criminal who had tortured or maimed a victim to be tortured or maimed in return. Such a punishment might satisfy certain vindictive desires that we or the victim might feel, but the satisfaction of such desires is not and cannot be an objective of a humane and Christian approach to punishment.

That is why so many representatives of so many national religious organizations have appealed to us in a letter which each one of us has received, which reads as follows:

> DEAR SENATOR: As representatives of national religious organizations we appeal to you to oppose S. 1765, a bill to reinstate the death penalty, which may come before the Senate in the near future. We oppose any legislation which sanctions the use of capital punishment.
>
> We believe in the sanctity of human life. The taking of human life, whether it be an independent criminal act or sanctioned by the state, is inhumane. Our religious convictions lead us to the belief that each individual has worth and dignity.
>
> We recognize that government has the responsibility to protect its citizens. Such responsibilities are necessary and should be carried through in a positive manner that leads to a safe, equitable, and just society. Our work brings us into touch with the deepest dimensions of the lives of both the victims and the perpetrators of violent crimes in our communities. We have witnessed the tragedy brought into the lives of victims of violent crime and also in the lives of those who commit such crimes. We be-

ATTACHMENT 6

one, the likelihood of error or improper imposition is so minor as to be virtually negligible. The committee report on the bill explicitly makes that claim in the following terms:

> The committee finds this argument—

This argument, I emphasize, is the argument that an innocent human being may be executed by mistake—

> The committee finds this argument to be without great weight, particularly in light of the procedural safeguards for criminal defendants mandated by the Supreme Court in recent years. The Court's decisions with respect to the rights of the individuals, particularly those expanding the right to counsel, together with the precautions taken by any court in a capital case, have all but reduced the danger of error in these cases to that of a mere theoretical possibility.

This is, indeed, a sanguine expression of confidence in our judicial system. The Bureau of Justice Statistics reports that for all of calendar year 1982, "about half the 64 persons who left death row by means other than death had both their convictions and their sentences vacated."

Both convictions and sentences means, not that sentences of death were commuted, but that the convictions themselves were found to be invalid. And that occurred in "about half" of 64 cases.

If this is an example of the infallible system of human courts—regardless how much effort is expended to perfect them—then the committee's airy claim that the danger of error has been reduced to that of a mere theoretical possibility is baseless.

The committee report also quotes approvingly the words of the minority report of a Massachusetts Special Commission of 1961:

> We do not feel * * * that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the State to inflict the death penalty can be questioned in principle * * *. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves.

This is indeed a unique view to take, not only of a presumptive State "right" to inflict death, but of the value of individual life to our society—a society and a system of government premised and founded on respect for the individual.

It is worth pointing out that the Constitution of the United States does not grant expressly to government the "right" to take life. It does, on the other hand, expressly deny government the right to inflict certain kinds of punishments.

So, for any minority of any commission to argue—as this Massachusetts commission minority argues in 1961—that some kind of State right to inflict death even exists is to betray a disregard for and incomprehension of our Constitution, which is breathtaking in scope.

And for the Judiciary Committee majority to cite such a perverse and misguided judgment shows only the thinness of the entire defense against the compelling and irrefutable fact that as long as we authorize capital punishment, we authorize the possibility of killing an innocent human being.

The irrevocable nature of the death penalty is precisely one of the reasons that I believe it can never be justified. We, as human beings, with all the fallibility that our human condition implies, do not have it within our moral capacity to authorize the taking of a human life. We may believe that we can, somehow, arrogate to ourselves such a power, but we will simply be condoning a usurpation of moral authority.

We cannot legitimize such a usurpation by any appeal to theories of government or morality. It is simply not given to human beings to make ultimate judgments, and the life and death judgment is nothing if not ultimate.

Constitutional experts disagree on the constitutional grounds for authorizing a death penalty. They disagree as to the kinds of procedural safeguards the Constitution requires. Experts in criminal justice disagree about the effect of the death penalty as a deterrent. The majority of our Nation's religious faiths strongly deny the moral basis for it.

(Mr. DANFORTH assumed the chair.)

Mr. MITCHELL. On this subject, in fact, the only semblance of agreement that even exists goes directly against the recommendation of the committee majority. I speak of the extremely broad-based opposition of all sectors of our religious community, who deny the moral authority for it, who deny the benefit to society from it, who deny any proper justification for the taking of human life except self-defense.

It is adduced, in the committee's report, that "protection of the society" assumes a moral imperative that legitimizes a Government-sanctioned imposition of death.

That is an ironic development in a nation and a society which has, painfully and carefully over the last two centuries, made huge strides in the civilizing task of limiting the Government's rights over individuals. Our society is as it is today, in part, because of our continued history of denying to Government the moral authority to take any steps it may think are needed to protect society. Indeed, our society has found that its protection is most assured when Government's reach is limited.

So to make the claim that the protection of society somehow compels the death penalty is to take an enormous leap beyond the perimeters of what we have allowed our Government to do to protect us. We have in the past and would in the future reject the Government's efforts to protect us by limiting political debate because some ideas are dangerous to society. Yet we are willing to grant to Government the supreme power that it may, through its imperfect human servants, take the life of a human being under certain conditions.

That seems to me to be a power that no government ought to have. It is a power that no government can infallibly apply. And it is a power that no government has the moral authority to claim.

When we consider the practical implications of this claim that the protection of society demands a death penalty, the realities are so completely at odds with the claim that the claim evaporates.

Consider the reality of what is being proposed. In this bill, the death penalty is intended to be applied to particularly nefarious murderers, as well as to nonmurderers, on the basis that by depriving these individuals of life, we will protect society.

There are in this Nation—or were at the end of last year—33,526 convicted murderers. They ranged from people who had encompassed the unintentional death of another through some act of their own to those who cold-bloodedly committed murder for hire. There were, however, only 1,163 actually on death row.

Through the fortuitous and circuitous processes of the law, a judgment has been reached by men and women in juries and courtrooms all over America that society demands the death of some 1,100 individuals who committed murder, but not of 32,000 others who also committed murder. These cases were all tried at the State level.

There is no reason to believe that a Federal death statute would show a significantly higher percentage of murderers condemned nationwide than has been the experience at the State level. I find no assumption or intention in the committee report to indicate that there is an intention to sentence more Federal prisoners to death row. To the contrary, the report carries clear language indicating the committee's desire that the penalty be applied only in the most extreme cases. So the actual outcome can be reasonably expected to somewhat parallel the outcome of State murder convictions and sentences.

Yet, if that is the case, then the committee says society will be safer to some noticeable degree if about 3 percent of federally indicted murderers are executed.

What kind of rational thought process can lead to such a conclusion? The demonstrated fact in literally thousands of State murder convictions is that the death penalty is applied in a random manner.

A very recent University of Iowa Law School study of the predictability of death sentences under the new, approved death penalty statutes reveals that virtually nothing has changed

Attachment 7

[From the Norfolk Virginian-Pilot, Sept. 5, 1980]

BILINGUAL MADNESS

In an effort to woo Hispanic and other ethnic voters, the Carter administration is prepared to trample on the liberties of state and local schools.

Those who swore the new federal Department of Education would be a "hands-off" bureaucracy were foolish. Already, its hands have been laid on local school curricula.

The issue now is bilingual education. New federal regulations demand that localities instruct foreign-born children in their native languages if two or more classes have 25 such children enrolled. For the two to five years the children receive such instruction, they are expected to get remedial English on the side.

The new regulations go beyond anything the Supreme Court has required. They appear to violate the statute under which the Department of Education was created. Certainly they flout every assurance of non-intrusion that the Department's backers gave.

But Jimmy Carter thinks bilingual education is what Hispanic, Vietnamese, Korean, and other ethnic voters want. We think if Jimmy Carter were looking for a way to divide this country, he couldn't have done a better job. Bilingualism postpones the day many minorities will enter the linguistic mainstream. It prolongs their condition of linguistic "illiteracy." Rather than bilingualism for non-English speaking children, we should be immersing them in English from the moment they arrive at our schoolhouse doors.

That's the view of Virginia School Superintendent S. John Davis, who plans to challenge the new regulations at a public hearing in Chicago on September 17. That's the view too of Virginia Attorney General J. Marshall Coleman who pledges to contest their enforcement in federal court.

Mr. Davis advocates what educators call the ESL (English-as-a-second-language) approach. This approach argues sensibly that the more English is used in schools, the faster children will learn to speak it. Fairfax County alone has an ESL population of more than 2,500 students representing 50 different languages. Tests, says Dr. Davis, have repeatedly proved ESL's educational effectiveness.

Dr. Davis has one other reason for resisting federal mandates; money. Implementing bilingualism would cost the taxpayers of Virginia an extra $10 million each year.

Implementation, says Virginia Education Secretary Wade Gilley, also means "that in addition to the more common languages such as French, German, or Spanish, we might have to find teachers who could teach in Vietnamese or even Swahili."

It's sad when presidential politics outlaws common sense. It's tragic when such politics mortgages the common destiny of a nation.

By 1990, Spanish-speaking Americans will surpass blacks as our most numerous minority. What feelings and loyalties will they develop toward a country whose dominant tongue many but dimly understand?

The compassionate course is to teach them English, the sooner the better. The principled course is to preserve the option of localities to do so, in the face of this latest federal power grab.

If defending these principles means going to court, then Virginia should.

The CHAIRMAN. Mr. Fajardo, where is your home? I do not have it on this sheet. Are you from Virginia?

Mr. TREVINO. Myself, sir?

The CHAIRMAN. Yes.

Mr. TREVINO. No, sir, I live here in the District and I represent the League of United Latin American Citizens. I hail from northern Mexico, via San Antonio, TX.

The CHAIRMAN. National executive director, League of United Latin American Citizens, and that is Washington, DC.

Mr. TREVINO. Yes, sir, that is Arnold Torres.

The CHAIRMAN. Thank you.

All right. Who is next to appear?

STATEMENT OF HELEN C. GONZALES, ASSOCIATE COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Ms. GONZALES. Mr. Chairman, my name is Helen Gonzales. I am the associate counsel for the Mexican American Legal Defense and Educational Fund here in Washington, DC.

Mr. SHORT. Which organization are you with?

Ms. GONZALES. I am with the Mexican American Legal Defense and Educational Fund.

The CHAIRMAN. Now, let us see; I had down here Richard P. Fajardo.

Ms. GONZALES. Right; I am appearing instead of Mr. Fajardo.

The CHAIRMAN. You are appearing in his place?

Ms. GONZALES. That is correct, Mr. Chairman.

The CHAIRMAN. And your name is?

Ms. GONZALES. Helen Gonzales. Can I just start my time now, Mr. Chairman, since I was answering questions?

The CHAIRMAN. You may proceed.

Ms. GONZALES. Thank you. I appear before you today to express our opposition to the nomination of J. Harvie Wilkinson to the U.S. Court of Appeals for the Fourth Circuit. Our opposition, Mr. Chairman, is based on the fact that Mr. Wilkinson does not meet the threshold qualifications for appointment as a Federal judge. Thus, it becomes clear that the nomination is premised solely on the conservative political philosophy which Mr. Wilkinson shares with this administration.

If this nomination is approved, it will be but another slap in the face to minorities and women alike who are repeatedly told that they cannot be given judicial or other appointments because they lack the qualifications necessary for these positions.

Federal appellate judges serve a very important role in our society. Their decisions can have a tremendous impact on individuals and communities. It is thus critical that individuals appointed to these positions be of the highest professional caliber.

In order to promote this goal, the American Bar Association has developed minimal criteria for evaluating a nominee to the Federal bench.

Since leaving law school, Mr. Wilkinson has had only a total of 8 years of legal experience, none of which includes trial work. While the ABA's minimal criteria call for substantial trial experience, this standard has been broadened in its application to include advocacy work generally.

However, even under this broader view, Mr. Wilkinson fails to meet the ABA's standard. Mr. Wilkinson's legal experience has left him completely unexposed to either client representation or practical advocacy experience. Thus, the record clearly shows that he lacks the experience necessary for appointment to the appellate bench.

It is also interesting to note that during his tenure at the Virginian-Pilot, a number of editorials were published which criticized the judicial selection process for being unduly political.

One such editorial concluded that "it is never too soon to begin stressing merit over connections." In this case, however, since merit is lacking, one must presume, as a recent editorial by the

Virginian-Pilot itself did, that Mr. Wilkinson's greatest qualification to serve on the bench is his conservative philosophy.

It is ironic, then, that Mr. Wilkinson would seek a position for which he lacks sufficient credentials to meet his own merit standard. It is also ironic that despite Mr. Wilkinson's insistence that appointments be based on merit and not political considerations, newspaper articles have indicated he has been lobbying extensively on his own behalf.

The Reagan administration has consistently denounced the use of affirmative action on the grounds that it leads to the appointment or hiring of unqualified individuals. Mr. Wilkinson himself wrote or approved editorials during his tenure strongly raising the same implication. Yet, both he and the administration now appear willing to subvert their own merit selection philosophies when it concerns the appointment of a white male.

Therefore, allowing Mr. Wilkinson to become a Federal judge is fundamentally unfair to the many qualified Hispanics, blacks, and women who have been repeatedly denied Federal judgeships because they allegedly failed to meet the ABA's minimal standards.

Appointment of Mr. Wilkinson, despite his current lack of more than 8 years of legal experience would create a double standard. Clearly, there must be others, including women and minorities, who, in fact, are qualified under the ABA's standard for this appellate judgeship.

The ABA's minimum standards under which others are judged should not be waived merely because a candidate is of the correct political philosophy.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

[Material submitted for the record follows:]

PREPARED STATEMENT OF HELEN C. GONZALES

Good afternoon, I want to thank the Chairman and the distinguished members here today for allowing me to testify on behalf of the Mexican American Legal Defense and Educational Fund (MALDEF). My name is Helen Gonzales and I am the Associate Counsel for the Washington, D.C. office. MALDEF is a national legal and educational organization devoted to protecting the civil rights of close to fifteen (15) million Mexican Americans and other Hispanic Americans. Currently, we have offices in San Francisco, Los Angeles, Sacramento, Denver, San Antonio, Chicago and here in Washington, D.C.

I appear before you today to express our opposition to the nomination of J. Harvie Wilkinson to the U.S. Court of Appeals for the Fourth Circuit. Our opposition, Mr. Chairman, is based on the fact that Mr. Wilkinson does not meet the threshold qualifications for appointment as a federal judge. Thus, it becomes clear that the nomination is premised solely on the conservative political philosophy which Mr. Wilkinson shares with this Administration. If this nomination is approved it will be but another slap in the face to minorities and women alike who are repeatedly told that they cannot be given judicial or other appointments because they lack the qualifications necessary for those positions.

Federal appellate judges serve a very important role in our society. Their decisions can have a tremendous impact on individuals and communities. It is, thus, critical that individuals appointed to these positions be of the highest professional caliber.

In order to promote this goal, the American Bar Association (A.B.A.) has developed minimal criteria for evaluating a nominee to the federal bench. An individual should be admitted to the Bar a minimum of twelve years, have substantial trial experience as a lawyer or federal judge, and, in exceptional cases, limited trial experience will suffice where the nominee has distinguished accomplishments in the field of law.

Since leaving law school, J. Harvie Wilkinson served one year as a U.S. Supreme Court law clerk, six years as a law professor, and one year in the U.S. Department of Justice. He also spent three years as an editorial page editor for The

Virginian-Pilot. Thus, Mr. Wilkinson has only a total of eight years of legal experience, none of which includes trial work. While the A.B.A.'s minimal criteria calls for "substantial trial experience," this standard has been broadened, in its application, to include advocacy work, generally. However, even under this broader view, Mr. Wilkinson fails to meet the A.B.A. standard. He is not even admitted to practice before the Court of Appeals to which he has been nominated nor to any of the federal district courts within that Fourth Circuit.

Mr. Wilkinson's positions at the University of Virginia Law School and at the Justice Department left him completely unexposed to either client representation or practical advocacy experience. Thus, the record clearly shows that he lacks the experience necessary for appointment to the appellate bench.

It is also interesting to note that during Mr. Wilkinson's tenure as an editor to The Virginian-Pilot, a number of editorials were published which criticized the judicial selection process for being unduly political.[1] One such editorial concluded that, "it is never too soon to begin stressing merit over connections."[2] In this case, however, since "merit" is lacking one must presume, as a recent editorial by The Virginian-Pilot did, that Mr. Wilkinson's greatest qualification to serve on the bench is his conservative philosophy.[3] Based on this lack of practical, legal experience even his former employer had to admit that his nomination should not be confirmed.

It is ironic, then, that Mr. Wilkinson would seek a position for which he lacks sufficient credentials to meet his own "merit" standard. In the selection of judges he, understandably, supported review of such criteria as legal ability and experience.[4] As

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1/ Choosing Judges on Merit, The Virginian-Pilot, Feb. 9, 1979; Change It, The Virginian-Pilot, Feb. 21, 1980; Was It Really Racist, The Virginian-Pilot, March 8, 1980.

2/ See, e.g. Politics Behind the Robe, The Virginian-Pilot, Jan. 18, 1979.

3/ Wilkinson as Judge?, The Virginian-Pilot, Jul. 29, 1983. Mr Wilkinson's published views on a number of issues parallel those of this Administration. See, e.g. Busing Embers, The Virginian-Pilot, Sept. 15, 1978; Busing Blues, The Virginian-Pilot, Feb. 11, 1980 (editorials during Wilkinson's tenure at The Virginian-Pilot opposing busing); See also Former Pilot Editor Named To Top U.S. Civil Rights Post, The Virginian-Pilot, June 6, 1982 (quoting Wilkinson for his opposition to court-ordered busing and numerical quotas).

4/ Choosing Judges on Merit, The Virginian-Pilot, Feb. 9, 1980.

indicated above, however, he falls short on these two key prerequisites.

It is also ironic that despite Mr. Wilkinson's insistence that appointments be based on merit and not political considerations, he has apparently been lobbying extensively on his own behalf. This point is reflected in the comment attributed to a Virginia congressional aide who described Mr. Wilkinson's political lobbying for the judgeship: "He's made phone calls, visited Congressmen's offices, and done everything except take out billboards and airplanes with streamers."5/

Thus, one has to surmise that Mr. Wilkinson believes that he need not follow his own advice.

The Reagan Administration has consistently denounced the use of affirmative action on the ground that it leads to the appointment, or hiring, of unqualified individuals. Mr. Wilkinson, himself, wrote, or approved, editorials during his tenure as an editor, strongly raising this same implication.6/ Yet, both he and the Administration, now appear willing to subvert their own "merit selection" philosophies when it concerns the appointment of a white male.

Therefore, allowing Wilkinson to become a federal judge is fundamentally unfair to the many qualified Hispanics, Blacks, and women who have been repeatedly denied federal judgeships because they, allegedly, failed to meet the A.B.A.'s minimal standards. Appointment of Mr. Wilkinson, despite his current lack of more than eight years of legal experience, would create a double standard. Clearly there must be others including, women and minorities, who are, in fact, qualified under the A.B.A.'s standards for this appellate judgeship. The A.B.A.'s minimum standards, under which others are judged, should not be waived merely because a candidate is of the correct political philosophy.

5/ "J. Harvie Wilkinson's inconsistencies, "The Virginian-Pilot, Nov. 15, 1983.

6/ "Politics Behind the Robe", Supra, and Hire Faculty for Quality, The Virginian-Pilot, Dec. 22, 1980.

Senator THURMOND. Now, who is next to appear?

Mr. GRAVELY. Me, Mr. Chairman; Virginia NAACP.

The CHAIRMAN. Now, Ms. Gonzales, where is your home?

Ms. GONZALES. Washington, DC.

The CHAIRMAN. Washington, DC., all right.

Now, next is——

Mr. GRAVELY. Jack W. Gravely, representing the Virginia State Conference, NAACP.

The CHAIRMAN. You are representing the NAACP in Virginia?

Mr. GRAVELY. State of Virginia, yes, sir.

The CHAIRMAN. We will be glad to hear from you.

STATEMENT OF JACK W. GRAVELY, EXECUTIVE SECRETARY, VIRGINIA STATE CONFERENCE, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. GRAVELY. OK. Can my time begin now?

Mr. Chairman, my name is Jack W. Gravely. I am the executive secretary of the Virginia State Conference, NAACP. I am a full-blooded Virginian, born, reared, and educated in the State of Virginia. I am also a graduate of the University of Virginia School of Law, receiving my J.D. degree from that university in 1972.

I am here to speak on behalf of the Virginia NAACP to voice our opposition to the confirmation of J. Harvie Wilkinson III, as judge on the Federal bench of the Fourth U.S. Circuit Court of Appeals in Richmond, VA.

The Virginia State Conference NAACP opposes this confirmation because of the following reasons. First, we feel he is simply unqualified to serve as a Federal judge. He lacks judicial experience, but clearly we understand that alone is not enough.

To place him in the lofty position of a Federal judge would do violence to the system of selecting Federal judges in this country. For many years, other groups and individuals could not pass the legal requirements of experience before assuming the position of a Federal judge, and we ask that this committee and the U. S. Senate do not cheapen the price of admission now.

Our research fails to indicate that Mr. Wilkinson has ever tried a case in a court of law. We stand to be corrected, but our investigation fails to uncover any practical courtroom experience as a lawyer on the part of the nominee. He simply lacks practical experience as a lawyer for the job.

Second, the Virginia State Conference NAACP opposes this nomination because of his limited, yet well defined, judicial philosophy. He represents an attack upon the Supreme Court's interpretation of the Constitution. His judicial philosophy is repugnant to the basic American legal principles of fairness, equality and justice for all men and women.

In summarizing, we oppose this nomination because of his lack of judicial experience, his lack of lawyering experience, his lack of demonstrated commitment to fairness, and our belief that his appointment is intended to accomplish within the legal arena the reversal of policies that some cannot change within the halls of state houses, city councils and the halls of Congress.

Respectfully submitted, Mr. Chairman, by the Virginia NAACP.

The CHAIRMAN. Thank you.

Mr. GRAVELY. Could I donate the balance of my time to——

The CHAIRMAN. Mr. Gravely, where is your home?

Mr. GRAVELY. My home is Richmond, VA.

The CHAIRMAN. Now, let us see; who wants to go next?

STATEMENT OF C. LYDON HARRELL, JR., LEGISLATION AND ADVOCACY, MOBILITY ON WHEELS INC.

Mr. HARRELL. Your Honor, the folks on the right want me to go next. [Laughter.]

Mr. SHORT. Could you identify yourself for the record?

Mr. HARRELL. My name is C. Lydon, L-y-d-o-n, not Lyndon, sir—I am not a politician—Harrell, H-a-r-r-e-l-l. I am from Norfolk and I am representing a handicapped group entitled Mobility on Wheels, Inc. It is a United Way agency representing the southeastern tidewater area.

The CHAIRMAN. You may proceed, Mr. Harrell.

Mr. HARRELL. I would like first to make it plain that I am not here to oppose the nomination of Mr. Wilkinson. If my personal opinion was any value, from what I know of him, I would endorse him.

But we are here, Ms. Dennison with me in the wheelchair, to raise before the committee and ask the committee to determine from him what his position is as to the civil rights of the handicapped.

The CHAIRMAN. Would you like for questions to be propounded to him on that subject?

Mr. HARRELL. Yes, sir; I have written them down.

The CHAIRMAN. When he comes up to testify, I will be glad to propound your questions.

Mr. HARRELL. All right, sir. He has these questions now, but if I may I would like to make a few remarks as to what these civil rights we are talking about are.

The CHAIRMAN. Well, if you have furnished him a copy, maybe he could reply to those for the record. In other words, if you have given him a copy, then we will put your questions in the record and his answers in the record.

Mr. HARRELL. Yes, sir.

The CHAIRMAN. Thank you. Did you have anything else you wanted to say?

Mr. HARRELL. Yes; I wanted to make a comment, sir, as to what these civil rights we are talking about are. I would like to give you some examples, if I may. If you get tired of listening, please stop me.

Some time ago, a young lady in a wheelchair went to Old Dominion University, which is a State university, and applied for a job. She was qualified. They said, "Yes, we will give you a job in the administration office, but how are you going to get into the office?" They refused to put a ramp in, so she could not get in to take the job they offered her. Now, the question is, were her civil rights denied.

The CHAIRMAN. Well, now, where was that, in Virginia?

Mr. HARRELL. Yes, sir.

The CHAIRMAN. Well, Virginia does not have a law to take care of handicapped people like that?

Mr. HARRELL. It has a section, sir; I can mail it to the committee, if you would like.

The CHAIRMAN. If they have a law and it is not being conformed to, action could be brought to require them to do it.

Mr. HARRELL. Yes, sir.

The CHAIRMAN. Now, if they do not have a law, then, of course, that would be up to the legislature and you would have to work with them.

Mr. HARRELL. Another example, sir, is the public service hospital in Norfolk, which is not in existence anymore. They refused to put a ramp in to the administration building, so a wheelchair person could not even apply for a job there; they could not get in to apply.

The officers' club at Breezy Point—I am a retired naval officer—has three steps to get in. If a person in a wheelchair wants to go in, they have to go in through the back door by the garbage cans, and the wheelchair people call that the roach approach.

My wife refuses to go because I have to pull her up and down the steps every time I go, and they will not be caused to suffer that indignity to be dragged in and out of a building. The question is, were her civil rights being denied.

The Federal building in Norfolk now is a good example of the situation. Prior to the building of that building, my wife and I went to the head GSA man in the area and requested that it be built according to the specifications so that the handicapped people could use the restrooms. He told us that he could not build it in any fashion different from what Washington sent down to him.

I wrote to the GSA office in Washington and they sent him the wrong plans, and today you cannot use those toilets if you are a paraplegic or a quadriplegic.

The CHAIRMAN. Well, if there is anything about the Virginia law, you all might contact the Governor and the legislature. Now, if there is anything at the Federal level that is not being done that should be done, I would suggest you contact your Senators and your Members of the House from Virginia, because these handicapped people should be taken care of.

Mr. HARRELL. Well, I thank you for your feelings, sir, and what we would like for you to do is——

The CHAIRMAN. Now, here in Washington, in these buildings here, I think they have taken care of it here. For instance, Senator East is handicapped; he is in a wheelchair and the Senate put in some special arrangements where he can come to the Senate.

In other Federal buildings here, I think they have done that and they ought to do it in other places where there are people who desire to use those facilities. But, again, I say if it is in the State of Virginia, I would suggest you contact the governor or the State legislature. And if it is at the Federal level, contact your Senators and Members of the House.

We are glad to have you here and I am very sympathetic to what you have to say.

Mr. HARRELL. Thank you, sir.

The CHAIRMAN. Now, I believe, Mr. Derfner, you wanted to go with this group?

STATEMENT OF ARMAND DERFNER, ATTORNEY, WASHINGTON, DC

Mr. **Derfner**. Yes, if you do not mind, Senator.

The **Chairman**. All right. You may proceed.

Mr. **Derfner**. My name is Armand Derfner and I am a member of the South Carolina Bar. I am currently in Washington but my home is in Charleston and I have an active practice in the fourth circuit, in which the nominee will sit.

I appreciate the opportunity to come here today to address the nominee's qualifications from the point of view of a practicing lawyer who has to go into court and face judges.

From my point of view, the problem is that the nominee simply does not have the experience and does not have the qualifications at this point to be a judge on the U.S. Court of Appeals.

The American Bar Association and this committee have traditionally applied standards that call for experience, and those are real requirements. When you were a judge in South Carolina, Mr. Chairman, you could not have done that job without the practical experience that you had gained.

As a practicing lawyer, when I go in front of a court, I need to know that the judges there are people who have had experience either in trials or in appeals or in representing clients or in commercial transactions, whatever it is, but some kind of experience, which unfortunately this nominee does not have.

Now, we have been told that he gained experience during his time in the Justice Department, and he has been kind enough to give us a list of the cases that he cited to the American Bar Association as the ones in which he played his most significant role.

From what I can tell from those cases, his role in those cases was far from litigation. Essentially, he was screening documents and he did not in any way—and could not have because of his lack of experience—supervise or participate in the process of litigating and trying those cases.

I have taken a look at several of the cases, and with the short amount of time that I have I do not want to go into any detail. But, for example, in my statement I talk about the problem of intervention. Apparently, the nominee was the architect of a policy of opposing intervention in Government cases by the very people, black parents of schoolchildren, who were the most affected. He did that, apparently, knowing that they would not have another opportunity to be heard, because of a fifth circuit rule. See *Hines* v. *Rapides Parish School Board,* 479 F. 2d 762 (5th Cir. 1973).

The very first case he lists for the American Bar Association, *United States* v. *Ector County,* involved an agreement between the United States and the school district, which was not agreed to by people who had been allowed to intervene.

The agreement was presented to the district judge, who was apparently asked to sign it without holding a hearing, which he did. Now the fifth circuit, just in the last 2 months, has bitterly criticized and reversed that case and sent it back because it said the intervenors had a right to be heard, *United States* v. *Crucial,* 722 F. 2d 1182 (5th Cir. 1983).

This is the kind of policy, as I understand it, that the nominee has been instrumental in carrying out, and it is something that he could not have done in good faith if he were familiar with the realities of trying a case.

In the area of handicapped people's rights, Mr. Wilkinson listed his role in the case of *Connecticut Association of Retarded Citizens* v. *Thorne,* yet there he engaged in meetings with officials of the State of Connecticut who were representing the defendant without notifying or having there the line attorneys who were trying the case.

That, again, is simply inconceivable from somebody who understood the realities of trying a case. Now, I am not talking about what the nominee's views are or what his attitude is toward the law or the Constitution. I am talking about whether the person has the experience and has been through the fray to be the kind of judge that has that kind of understanding.

There are other cases here. I am not going to go into detail on all of them, but frankly my understanding is that the nominee did not in any of these cases—no matter how many people it is said that he supervised in some formal sense—participate in the litigation. And that really is not a substitute for experience because he just did not get any.

If I might just say one sentence to finish up, I have no illusions. The likelihood is that this nominee may well be confirmed, but if this committee and the Senate vote to confirm him, knowing everything that we have been told—or that blacks and minorities and women have been told over the years—about what the requirements are, then you will know that it is wrong, and we will all know that those standards that we were told about for so many years really never mattered at all.

I ask you to be fair and to approach this with sincere evenhandedness, and I think under those standards this nominee, simply does not meet the standards that we have been told should be applied.

Thank you very much.

The CHAIRMAN. Thank you.

Mr. DERFNER. I have a statement which I handed up to the counsel, and I have several documents that I would like to supply to the committee.

[Material submitted for the record follows:]

PREPARED STATEMENT OF ARMAND DERFNER

For most cases in the federal courts, the circuit courts of appeal are effectively the law of the land. They decided 28,000 cases last year. In about 2500 of these cases, the Supreme Court was asked to hear a further appeal, but it could so in only about 100.

The responsibility of the circuit courts is carried out by fewer than 150 judges in thirteen circuits. J. Harvie Wilkinson III, of Virginia, has been nominated to fill one of those seats. He would sit on the Fourth Circuit, which hears all the appeals from the States of Maryland, Virginia, West Virginia, and North and South Carolina. Last year the Fourth Circuit decided 2700 cases.

Mr. Wilkinson is 39 years old and has been out of law school for 11-plus years.

The American Bar Association's standards for federal judicial nominees call for a minimum of 12 years experience. No person in recent memory has been nominated for the appellate bench with less. The ABA has three levels of acceptable recommendation--exceptionally well qualified, well qualified, and qualified. Mr. Wilkinson received a rating of qualified, the lowest acceptable rating. It is reported that even the decision to give Mr. Wilkinson the rating of "qualified," rather than "not qualified," was a subject of considerable controversy on the ABA committee.

The problem with Mr. Wilkinson is not simply the short time he has been out of law school, but his dearth of experience since that time. His resume may be that of a bright young man with promise for the future, but there is nothing to suggest that he is ready now for a judgeship, especially on the United States Court of Appeals. Such positions, as the ABA points out, should be reserved for those men and women who meet not only the stringent criteria required of any federal judges but in addition "have an unusual degree of overall excellence that would provide an inspiration and an example to trial judges."

Since leaving law school, Mr. Wilkinson's 8 years of legal experience consists of a year as a Supreme Court law clerk, 6 years as a law professor, and a year in the Justice Department. The other 3 years since law school graduation were spent as a newspaper editor in Norfolk.

During his 8 years of law-related work, it does not appear that he has ever represented a client, tried a case, written a brief, or argued an appeal, whether for a paying client or in a pro bono matter. Indeed, it appears that even today he is not admitted to practice in the very court on which he is to sit, nor in any district court in the circuit (or any other district court).

His sole experience came during his single year in the Justice Department. There he screened the work of lawyers engaged in cases, but could hardly do any real supervising, and took virtually no active role in any cases himself. The closest he got to a case appears to have been a simple motion he presented in the Baton Rouge school desegregation case.

Of course there have been first-rate judges who had little litigation experience before going on the bench, but these others at least had experience in other types of law practice, whether in advising clients, negotiating transactions, engaging in administrative proceedings, or any of a large number of other ways that lawyers can gain experience.

Likewise, some of our finest judges have had academic backgrounds, but they have been distinguished teachers of long-standing, and have generally leavened their academic experience with exposure to other aspects of the law. For example, the Fourth Circuit has another judge who came from a law school, U.S. Circuit Judge J. Dickson Phillips. Phillips had been Dean of the School of Law of the University of North Carolina for 15 years at the time of his appointment in 1978. He had been admitted to the Bar for 30 years, and in addition to his eminence as a teacher, had also been in private practice for a dozen years. At the first hearing on Mr. Wilkinson's nomination, a comparison was made to Justice Felix Frankfurter--but of course there is no real comparison. When Justice Frankfurter was nominated in 1939 he had been a law professor for a quarter of a century, and in addition to his nationwide preeminence in the academic world, his other experience was extraordinarily varied, beginning with his five years as an Assistant United States Attorney in the Southern District of New York, and never stopping after that. Finally, Mr. Wilkinson mentioned several other former law teachers--Judges Winter, Posner, Scalia, and Breyer--but again a short look at their careers shows just how far different their situations are from Mr. Wilkinson's.

The paucity of Mr. Wilkinson's experience is all the more curious in light of his own steadfast insistence on pure merit selection of judges--in the past. His newspaper editorials include at least a dozen repeatedly criticizing the selection of judges on any basis other than merit. His criticism extends not only to appointment for political reasons, but also to appointment of people without sufficient experience, particularly women and blacks. In light of these editorials, perhaps it is not surprising that his own newspaper, the Norfolk Virginian-Pilot, has criticized his nomination.

The lack of experience is not a technical issue. We appoint our judges not to be theoretical philosophers of the law, but to decide cases, great and small, that raise live issues between live litigants. We also insist that those cases be decided not on the basis of abstractions, but on factual records consisting of evidence produced at trials. Circuit judges, especially, need to be sensitive to that fact because they will not see the witnesses, but will be confronted with cold records and will have to try to put thenmselves in the shoes of the district judges who have been there. While litigation experience may not be absolutely essential for a circuit judge, some awareness of the problems of proving and defending a case is essential. That awareness can be gained in many ways, none of which Mr. Wilkinson has ever gone through.

His Justice Department service--essentially reviewing drafts of briefs and memoranda to make certain they did not contradict the policy goals of the Attorney General--illustrates the problems created by his inexperience. Apart from displaying a great unfamiliarity with the problems of presenting cases, two good, specific examples of his failure to understand the realities of litigation involve the questions of remedies and intervention.

> Remedies. The Administration claims that it has sought more effective remedies for discrimination--for example, dealing with employment discrimination by emphasizing recruitment of qualified minority applicants rather than specific hiring goals. Yet Mr. Wilkinson has consistently blue-penciled efforts in specific cases that are necessary to make recruitment an effective remedy. Any litigator knows that recruitment will not work unless there are incentives such as recruitment goals (not to be confused with hiring goals), or reporting provisions. Such provisions were and remain a standard approach in cases in other sections of the Civil Rights Division, and they do not raise whatever philosophical problems some people have with hiring goals; yet Mr. Wilkinson refused to allow their use, even when a school district was willing to agree. The net result is to make it impossible for recruitment to do the job claimed for it, which means either going to a more stringent remedy or more likely (since Mr. Wilkinson is apparently unwilling to adopt any stronger remedy under any circumstances) just giving up on any remedy of any kind.
>
> Intervention. In many areas of the law, enforcement suits can be brought by both the Justice Department and by private citizens. Frequently, the Justice Department will intervene in an ongoing private suit, or vice versa. Until two years ago, it was virtually unheard-of for the Justice Department to oppose intervention by private citizens where those citizens had a direct interest in the controversy (for example, black parents intervening in a Justice Department suit to desegregate their school district). Yet, in recent cases supervised by Mr. Wilkinson, the Department has adopted the position that intervention by black parents should be denied on the ground that the Department adequately represented their interests—even while Department personnel said privately the reason they opposed intervention was because they regarded the intevenors as their adversaries. These cases have resulted in great embarrassment to the Department because, in addition to the trnasparency of the claim that the Department was adequately representing the intervenors' interests, there were several cases about the same time where the Justice Department supported the intervention of white petitioners for intervention. Moreover, in one of Mr. Wilkinson's cases (Charleston County, South Carolina) the Department stood alone in its anti-intervention position because even the school board defendants did not oppose intervention; in the other case (Choctaw County, Mississippi) Mr. Wilkinson redrafted a memorandum, turning it from one supporting intervention into one opposing it on the ground that the Department could do everything the intervenors were complaining about. The net result is that (1) the intervenors have been kept out of the case, (2) they have been prevented from filing their own case, under a fifth circuit rule--which Mr. Wilkinson was either unaware of or unconcerned about—providing that only one lawsuit may be filed in such circumstances, and (3) more than a year later, not one thing has been done in the case.

Mr. Wilkinson's editorials reflect the same attitude: a preoccupation with opposition to remedies for problems. He says he is opposed to certain remedies--school busing and hiring quotas. If that were all he was opposed to, he would obviously have some company. In fact, though, there is little sign that he has ever supported any remedy. Thus, he has written editorials saying hiring goals should be scrapped in favor of encouraging recruitment--only to oppose effective recruitment when the opportunity came his way in the Justice Department. Likewise, among his editorials and his Justice Department tenure, the list of his dislikes includes bi-lingual education and effective remedies for discrimination against handicapped people,

How he would propose to solve any of these problems he does not say. Yet these are precisely the problems that a federal judge, especially a circuit judge, must grapple with.

Mr. Wilkinson is probably the least experienced appellate nominee ever seen. For many years, efforts to appoint qualified minority people and women to the federal bench were stymied by claims that there were few potential nominees with enough experience. Only in the past few years have numbers of blacks and women had the experience necessary to meet the exacting standards of the ABA and the United States Senate. Ignoring the standards for Mr. Wilkinson, after all the talk over the years, is simply unfair.

If a black or a woman with his qualifications were nominated, Mr. Wilkinson would be the first to write an editorial insisting on merit selection rather than "affirmative action." Mr. Wilkinson does not meet the standards for confirmation as a United States Circuit Judge. If he is confirmed, that will send us all a clear message that the standards don't really mean anything after all.

The CHAIRMAN. Thank you. Now, I believe Ms. Elaine Jones will be next.

STATEMENT OF ELAINE R. JONES, ASSISTANT COUNSEL, LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Ms. JONES. Thank you, Senator Thurmond; thank you very much. My name is Elaine Jones. I am associate counsel with the NAACP Legal Defense Fund. I am a native of Norfolk, VA; that is my home. I entered law school with Mr. Wilkinson in 1967.

For 13 years, I have been a practicing attorney, litigating in several circuits, including the fourth circuit, and the fifth circuit. I have tried cases at the trial level and argued cases on appeal.

I graduated from the University of Virginia Law School 2 years ahead of Mr. Wilkinson. Mr. Wilkinson dropped out to run for political office and came back.

You know, Mr. Chairman, over 125 persons have been nominated by Mr. Reagan for the Federal bench. I have never appeared before this Committee during the Reagan administration to oppose any nomination. This is my first, so it is not a question of Mr. Wilkinson's political philosophy, and I readily admit that mine differs from his.

It is, however, a question of his experience. Mr. Wilkinson has a total of 8 years of law-related experience; that is it, 8 years. He has no advocacy experience whatsoever. Now, when I say advocacy experience, I do not mean trial work, necessarily, because there are lots of lawyers who do not go to court.

I am talking about having represented a client at some point in his life. I am talking about having written a brief, argued an appeal, having done something that shows that he understands the nature of attorney-client relationships. That is a huge gap in Mr. Wilkinson's background and one, since he is a young man, that he can take time to develop before being appointed to the fourth circuit court of appeals.

I have read Mr. Wilkinson's submissions. I do come here with some reluctance. I have read his writings; I have read his editorials for the 3 years he served as the editor of the editorial page of the newspaper, The Virginian-Pilot. Norfolk is my hometown, so I am familiar with that newspaper.

We have before us, frankly speaking, hesitantly speaking, a man who at this stage in his career is facially unqualified to be appointed to the fourth circuit court of appeals. He compares himself to other academics. He says, look at Ralph Winter and Stephen Breyer in his testimony on November 16.

In my statement, at pages 3 and 4, I talk about those qualifications of other academics. Yes, academics should be appointed to the court, but when you look at Mr. Wilkinson, stacked up against other academics, he falls far short. I mean these academics and others have 16 years, 17 years, 22 years, 25 years, teaching experience and having done other work as well.

My final point on that, Senator Thurmond, is that I do not know what the ABA did. I mean, it boggles my mind that they can find

Mr. Wilkinson meets their minimal qualifications. If he meets their minimal qualifications, then their qualifications are meaningless.

Now, it is my understanding—and it is up to the committee to document, and I am under oath so I cannot state it categorically—but it is my understanding that Mr. Wilkinson initially was found preliminarily unqualified by the American Bar Association circuit representative, and that they then considered him on a formal vote and after intense lobbying gave him their minimum rating of "qualified".

Now, if that, in fact, did happen, the committee can investigate and determine. If it did occur, I do not know why it happened. I know the committee was lobbied heavily and intensely, although Mr. Wilkinson has opposed lobbying and politics in the judicial process.

One final thing: I have looked at every appellate court judge in this country; I have looked at every judge who now sits on a Federal appellate court of appeals. Mr. Wilkinson falls far short of any of them; he does not measure up.

Thank you very much.

[Material submitted for the record follows:]

PREPARED STATEMENT OF ELAINE R. JONES

Mr. Chairman, my name is Elaine R. Jones and I am an associate Counsel with the NAACP Legal Defense Fund. I am a native Virginian; I attended law school with Mr. Wilkinson, and I have practiced law in the federal courts, including the Fourth Circuit, for over thirteen years.

I have testified before this Committee several times on subjects of mutual interests, subjects ranging from the voting rights act to procedures for evaluating judicial nominees.

Yet at no time have I been more reluctant to appear than today. But as a matter of fairness and principle I have little choice.

Since he has been President, Mr. Reagan has nominated more than 125 persons to the Federal bench, many of whose philosophy and views on fundamental social issues might differ from mine. However, prior to this appearance I have not appeared before this Committee to testify on a single one of Mr. Reagan's nominees. Mr. Wilkinson's is my first appearance on a judicial nominee during this administration.

After having read Mr. Wilkinson's submissions, having interviewed and talked with people with whom he has worked and reviewing his overall record, I have concluded that it would be fundamentally unfair for this committee to confirm Mr. Wilkinson.

There is a fundamental question of fairness here that must be raised. And that is the issue of fairness with regard to the judicial selection process. It is a question that runs to the American Bar Association's Standing Committee on the Federal Judiciary.

We have before us a nominee who, when viewed objectively, is facially unqualified for appointment to the appellate bench.

At the time of his nomination he had been in the field of law barely eight years, six of those as a law professor. Even adding the three years of his newspaper experience, at the time of nomination Mr. Wilkinson did not have twelve years at the bar which is the requirement of the American Bar Association (ABA). A very strong argument can be made that 12 years at the bar, which is the ABA standard, means for an appellate nominee 12 years of law-related work, in which case Mr. Wilkinson has only 8. For the six years that he has taught law school we understand that Mr. Wilkinson is highly regarded as a law professor, yet we do not think that that qualifies as "significant evidence of distinguished accomplishment in the field of law," which is the applicable language in the ABA standards when one has limited trial experience (p.3). However, Mr. Wilkinson has no trial experience, nor any out of court experience representing the interests of a client. Nor, we understand, is he even a member of the Circuit court to which he has been nominated to serve. It is then quite confusing to see how, if one uses principles of merit selection, that Mr. Wilkinson merits this appointment. In his testimony before this Committee on Wednesday, November 16, 1983 Mr. Wilkinson refers to the nomination of Stephen Breyer (1st Circuit), Ralph Winter (2nd Circuit), Antonia Scalia (D.C. Circuit) and Richard Posner (7th Circuit) for the proposition that academics can serve ably on the appellate courts. That is true.

However, the issue is not whether academics can serve (they certainly can and should), the issue is the qualifications of Mr. Wilkinson to serve, with 8 years of law-related experience and only 6 years in academic life with no advocacy experience whatever.

At the time of his nomination, Stephen Breyer had 16 years of law-related experience, 12 of those as a law professor at Harvard; Ralph Winter had 22 years teaching experience and taught at Yale Law School; Antonio Scalia had been a member of the bar over 20 years, had taught law for nearly 12 years at the University of Chicago, Stanford and the University of Virginia, an additional 6 years in the actual practice of law and 6 more years in government service. Richard Posner had over eighteen years at the bar, 11 years in academic life and more than six years in government service. Mr. Wilkinson's comparisons simply do not hold up when one reads the record. Much has been made by Mr. Wilkinson himself of his similarity to others "academics" who were successfully appointed to the bench. A survey of those appointed in the last few years to the appellate bench shows that there is no other member of any Circuit Court of Appeals who has been out of law school such a short period of time, has so little law-related experience, and who has no courtroom or advocacy experience. It is a formidable combination of inadequacies.

Minorities and women have often been reminded that as a general proposition they do not have the requisite experience to serve on the appellate bench because they have only graduated from law schools in significant numbers over the past 10-15 years. Every minority and woman appointed to the appellate bench in the last two administrations has objectively met and/or exceeded the applicable ABA standard.

If a minority or a woman, with the amount of experience Mr. Wilkinson has, had been interested in an appellate judgeship she/he would not have gotten to first base. First, they would have most certainly been found unqualified by the ABA; secondly, they would not have received the nomination; and thirdly, if they had received the nomination, I do not believe they would have ever passed the scrutiny of this Committee.

If no advocacy experience and limited teaching experience is enough to earn a qualified rating for the appellate bench, then the ABA standard is meaningless, as is the selection process.

The Committee now considers the nominaton of a white male from a privileged background who has connections of power and who does not meet the qualification standards now met by every federal appellate jurist in the Country. We urge the Committee to act on principle. If Mr. Wilkinson is confirmed it will tell the world more clearly than anything else, that there is a double standard: one for minorities, women and all other appellate judges and another for Mr. Wilkinson.

We ask now only for fairness: that the standard that applies to all other federal appellate jurists in the Country be applied to Mr. Wilkinson. If that is done, this nominee will not be confirmed.

The **Chairman**. Thank you very much. I see you are a good talker, anyway. [Laughter.]

Ms. **Jones**. I hope you were listening, Senator.

The **Chairman**. To every word. [Laughter.]

We are glad to have you with us.

Ms. **Gonzales**. Mr. Chairman, if I may just make one point, I meant to ask that my complete statement be put into the record, please.

The **Chairman**. Without objection, your statement will go in the record.

Ms. **Jones**. All of us, Mr. Chairman, would like to do that.

The **Chairman**. Yes. The statements, if you did not finish them—in other words, we will pick up where you left off. [Laughter.]

We do not want the Government to print twice, but we want your full statements in the record.

You will see to that?

Mr. **Short**. Yes, sir.

The **Chairman**. All right. Now, we will excuse you all, and thank you very much for your appearance.

We will now take the second panel. Although I am the only one here today, the full committee will consider this testimony. Now, Mr. Bobby Stafford, Mr. Robert Jefferson Roehr—is that Pat Winton? Who is Pat Winton?

Ms. **Harrison**. I am representing two organizations.

The **Chairman**. I see. Give your name now.

Ms. **Harrison**. Edythe Harrison, and I would appreciate, seeing that I am going to represent the other organization that was allotted time, if I may just have——

The **Chairman**. You are representing both organizations?

Ms. **Harrison**. Yes, so if I may have just 2 extra minutes to represent the other organization.

The **Chairman**. Do you think it will be a different argument from that organization?

Ms. **Harrison**. Well, there might be a couple of additional points, sir.

The **Chairman**. Now, Thomas DePriest will complete this group. Who wants to go first?

TESTIMONY OF BOBBY B. STAFFORD, PRESIDENT, OLD DOMINION BAR ASSOCIATION

Mr. **Stafford**. I will, Mr. Chairman.

The **Chairman**. All right, Mr. Stafford. I believe you are from Williamsburg County, SC.

Mr. **Stafford**. That is correct, Mr. Chairman, and it is a great pleasure for me to appear here. Of course, I am always down in South Carolina and I am a member of that bar. I was born in North Carolina, raised principally in South Carolina, educated in higher education in North Carolina; subsequently, law school in Washington.

I am a member of the Washington bar, the Virginia bar, and the South Carolina bar, and I have practiced in Georgia, Florida, South Carolina, Virginia, and the District of Columbia.

The **Chairman**. Well, you are a man for all seasons. [Laughter.]

We are glad to have you with us. You may proceed.

Mr. **Stafford**. Mr. Chairman, I am president, also, of the Old Dominion Bar Association. The Old Dominion Bar Association is a statewide bar association which has existed since 1941 in the Commonwealth of Virginia.

I am pleased to have this opportunity to appear before this committee.

The **Chairman**. Is that a different association from your Virginia Bar Association?

Mr. **Stafford**. That is correct, Your Honor.

The **Chairman**. Well, is this black lawyers or is it just a separate organization of black and white both?

Mr. **Stafford**. Well, we have some of both, but I think if you would define it, I think it is mostly blacks at the present time.

The **Chairman**. All right, you may proceed.

Mr. **Stafford**. I am pleased to have this opportunity to appear before this committee. However, it is with significant pain and reluctance that the Old Dominion Bar Association expresses its opinion respecting the nomination of Mr. J. Harvie Wilkinson as a judge for the U.S. Court of Appeals for the Fourth Circuit.

However, as attorneys who practice before the U.S. Court of Appeals for the Fourth Circuit, it is the Old Dominion Bar's obligation to come forward and speak up on this nomination.

The ODBA firmly believes that the appointment of Mr. Wilkinson to the U.S. Court of Appeals for the Fourth Circuit would diminish the respect of the bench and bar for the quality of judicial experience on the court and for the appointment and selection process for judicial judges.

Mr. Chairman, I have a statement and I would ask that it be submitted to the record, and I would like to comment and elaborate further.

As I well know, you are a former judge, and one of the speakers alluded to that. As we all know, we do have an appreciation for a broad range of experiences, and particularly I am concerned not necessarily with law experiences, even though those related in the practice of law—I think we have come to a respectable opinion with respect to those kinds of experiences as to what they can lend to one's credibility and one's wisdom and judgment in terms of being elevated to a higher position.

Consequently, it is our view, as discussed before our executive committee of the Old Dominion Bar, that the nominee does not possess these kinds of experiences. We believe that involvement with many of the human problems—the problems that lawyers have, the problems that litigants have, problems with people and the law—we can come to the conclusion that these kinds of experiences will make one more apt to understand the depth and perception of those human problems.

We feel that if the nominee had these varied experiences and background, he would lend the kind of credibility and certainly would enhance his qualifications and competence to be elevated to such a high position where he is going to review several layers of administrators, courts, and lawyers underneath him.

One can only appreciate, I believe, the type of problems and the depth of those problems underlying that decisionmaking by others if one has had a multifaceted development careerwise so that he could render competent decisions.

For these reasons, the ODBA could not standstill without letting its views be known.

Thank you.

[Material submitted for the record follows:]

PREPARED STATEMENT OF BOBBY B. STAFFORD

Mr. Chairman, I am Bobby B. Stafford, President of the Old Dominion Bar Association ("ODBA"). The Old Dominion Bar Association (ODBA) is a statewide bar organization which has existed since 1941 in the Commonwealth of Virginia. I am pleased to have this opportunity to appear before the committee; however, it is with significant pain and reluctance that the ODBA expresses its opinion respecting the nomination of Mr. J. Harvie Wilkinson as a judge for the United States Court of Appeals for the Fourth Circuit. However, as attorneys who practice before the U.S. Court of Appeals for the Fourth Circuit, it is ODBA's obligation to come forward and speak up on this nomination. The ODBA firmly believes that the appointment of Mr. Wilkinson to the United States Court of Appeals for the Fourth Circuit would diminish the respect of the bench and bar for the quality of judicial experience on the court and for the appointment and selection process for judicial judges.

As practitioners before this court, we are keenly aware of the need for and the expectation that the judges who adjudicate our cases will possess exemplary judicial qualifications who have been carefully selected from the most experienced and able members of the bench or bar. We again wish to emphasize that there are tremendous risks for a bar association to oppose a lifetime judicial appointment. However, in the event the Senate confirms Mr. Wilkenson for appointment to the Fourth Circuit, the high quality of the judiciary could be seriously compromised.

The constitutional importance of an independent and able federal judiciary is unquestioned. And, the Senate's duty to confirm each nominee for the federal judiciary is clear evidence of the profound public interest in assuring that qualified persons are entrusted to the powerful position of a federal judgeship.

To facilitate the public interest, the American Bar Association Standing Committee which evaluates judicial nominees, long ago established minimum evaluation criteria a nominee for the federal bench should possess. The ABA criteria clearly require (1) admission to the bar at least a minimum of twelve years, (2) substantial trial experience as a lawyer or federal judge, and (3) in exceptional cases limited trial experience will suffice where the nominee has distinquished accomplishments in the field of law. Mr. Wilkinson is believed not to possess any of these qualifications. The ODBA has recently learned that Mr. Wilkinson is not even admitted to practice before the U.S. Court of Appeals for the Fourth Circuit for which he seeks an appointment, nor any of the federal district courts in the Curcuit. This is alarminq.

Notwithstanding its evaluation criteria, the ABA has expediently and miraculously found Mr. Wilkenson qualified for appointment as a federal judge. In your consideration of the ABA's departure from its evaluation criteria, it should be noted that the ABA evaluation criteria and its recommendation are merely an aid to the Senate and not a supplement nor substitute for the judgment of this committee or the United States Senate. The ODBA considers the ABA's finding that Mr. Wilkinson is qualified to be a federal judge an affront to deserving and qualified practitioners and jurists of all races and both sexes in the Commonwealth of Virginia. Mr. Wilkinson has not had any practical legal experience to carry to the bench. Practical legal experience is not limited to trial experience, but may be derived from client contact, motion practice, administrative proceedings, or other advocacy experience.

Attorneys who argue cases before judges of the Fourth Circuit must have unquestioned confidence in the ability of the judges to understand quickly, soberly and intelligently the issues presented. Attorneys generally have only thirty (30) minutes to argue their cases, whether legal issues raised are procedural or substantive or whether such issues involve preservation of life, liberty or property. The judges must often resolve issues presented based on the law cited in a short brief as well as based on their prior experience as a jurist and/or practicing attorney. There is no time -- and there should be no need -- to explain to the judges the exigencies of a legal practice, whether plaintiff's or defendant's counsel or as a defense attorney or prosecutor in order to assure that the judges evaluate the issues in the proper framework. Accordingly, in view of Mr. Wilkinson's lack of practical experience at the bar or on the bench, he would be substantially disadvantaged as an appellate judge and this would inure to the profound detriment of the lawyers who will appear before him. It must not be forgotten that these lawyers will be representing clients who have important legal and factual disputes.

At the time of his nomination, Mr. Wilkinson has been a member of the bar not quite twelve years, he also has not had the benefit of having attorney-client relationships. An attorney derives significant growth through the wide breath of attorney-client relationships. The attorney-client relationship critically affects the decisions that counsel makes and directly influences and shapes the posture of counsel's case as it appears before the appellate court. Absent practical experience derived through attorney-client relationships, Mr. Wilkinson would be required to make his decisions by vicariously considering or hopelessly speculating about practical considerations that affect legal issues and inferences. These practical considerations which are so vital to the appellate bench in the fair resolution of important controversies would be "second nature" to an experienced lawyer or judge. Such a glaring deficiency in Mr. Wilkinson's qualifications can only lead him to apply mechanically principles of law to resolve legal issues, while failing to comprehend or perceive practical considerations that will impact on his opinions. The federal bench, the bar and the public deserve and expect a truly qualified appointment who has the requisite experience and depth to consider justly those disputes which will come before the bench.

In conclusion, having had no attorney-client relationships, no trial experience, no distinquished accomplishments in the field of law and/or no judicial experience, Mr. Wilkenson is clearly unsuited for the federal appellate bench. Given his record of achievement in various and sundry endeavors, with time Mr. Wilkinson may be able to obtain the requisite legal experience to qualify for appointment to the federal bench.

Mr. Chairman, the ODBA respectfully requests this committee on behalf of its members and all the trusting citizens of the Fourth Circuit to give Mr. Wilkinson an opportunity to obtain the requisite legal experience before being thrust into the position of a federal appellate judge. It is our considered opinion as practitioners in the Circuit that this nomination should not be confirmed.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Stafford.

Who is the next witness?

STATEMENT OF EDYTHE HARRISON, NATIONAL WOMEN'S POLITICAL CAUCUS OF VIRGINIA, AND NATIONAL ORGANIZATION FOR WOMEN

Ms. HARRISON. I will go next, sir.

The CHAIRMAN. Ms. Harrison, you may proceed.

Ms. HARRISON. I would like to request, please, that my statement be submitted for the record.

The CHAIRMAN. All right. Your statement will be included in the record. In case you duplicate the statement, then we will reserve the right to eliminate duplication.

Ms. HARRISON. Thank you. Mr. Chairman, I am Edythe Harrison, a resident of Norfolk, VA, speaking for the National Women's Political Caucus and, included today, the National Organization for Women. I am a past member of the Virginia General Assembly and have been a community activist in a variety of projects for many years.

I came to know Mr. Wilkinson personally when he resided in Norfolk, when he was the editor of the Virginian-Pilot newspaper; this was the editorial page editor. I am well acquainted with his beliefs and modes of expression through his writings and personal conversations, and I am here to comment on Mr. Wilkinson's judicial temperament as revealed in his own writings as the editorial page editor, and in his books.

It is obviously with some uneasiness that I testify due to what I consider a good, personal relationship with Mr. Wilkinson. However, as chair of the second district women's political caucus and as a very concerned citizen, I feel obligated to share with the committee my knowledge on this appointment.

We have heard, and I agree, that Mr. Wilkinson lacks the experience in representing clients, whether in or out of court. He lacks experience either as a lawyer sweating out a case with a client whose life, liberty, or future is at risk, or as a judge, called upon day after day to render discriminating opinions about difficult matters.

In view of these facts, it is more than relevant to consider his performance as an editorial writer to glean insight into this man as a journalist, a lawyer, and a person. This is especially so in view of the fact that Mr. Wilkinson cites his 3 years' experience for this appellate judgeship.

I must ask certain questions. I must ask if he was temperate in his judgments. Did his editorials reveal the writer as a person of depth, of learning, and mature insight, or someone deficient in these qualities? Was he arrogant? Was his language precise and thoughtful? Did he enlighten as well as provoke?

Did he liken his responsibilities in the post of editor to those of a judge, who must give due weight to all sides of a controversy, examine and state carefully the arguments on all sides, and make his decision from the best available evidence to him?

Unfortunately, our conclusion is that Mr. Wilkinson falls short in all aspects. An editorial writer does what a judge does. Editorial writers, like judges, confront controversial issues, and both should be fairminded, look at both sides of the question, and pose reasonable solutions.

Since Mr. Wilkinson, again, is relying on this experience, it is very important to look at his writings for the qualities that would indicate this judicial temperament. In evaluating his editorials, we looked for this evidence of fairmindedness and compassion and one who understands the complexities and practical implications inherent in legal disputes.

A judge may be a political appointee, but judges are not politicians. Mr. Wilkinson's style has the forensic tone of a campaigning politician or of an adversary lawyer in front of a jury, and not the mediating tone of an impartial judge.

Mr. Wilkinson obviously is intelligent and aware of the problems in society. In his editorials, he asks all the provocative, rhetorical questions, often inflammatory in style, but he offers no solutions to these problems.

Now, this is acceptable for a teacher or a writer, who can deal in hypotheticals, but it is not appropriate for a judge, or even an editorial writer who must feel a responsibility to the community which looks to him for enlightenment. But it certainly is not appropriate for a judge, who must take responsibility for his words, knowing that his words will become law.

His editorials have covered a number of highly controversial subjects. Issues are arguable, but Mr. Wilkinson does not argue the case if arguments mean weighing for or against and coming to one's own conclusion. His adversarial style forces the argumentation to move exclusively between two absolute extremes.

I would like to make two additional points for the other organization, please. I would like to point out that on the most agonizing questions of race, education, and equal opportunity, Mr. Wilkinson offers not enlightenment, but rhetoric that is empty with a scholarly, intellectual gloss, which is really useless as a guide to reasonable resolution of fundamental social problems.

I will quote just from one of his editorials, but the rest will be submitted: "Compulsory busing is madness. Compulsory busing between city and suburb is madness multiplied," writes Mr. Wilkinson.

Is this the best thinking of a legal scholar who has explored the complex issues involved in dismantling separate but unequal racially identifiable schools? Is all busing madness? Is busing in conjunction with paired and magnet schools to upgrade schools, teaching, and educational programs madness?

Is busing to remedy State-caused inequities in the financial support of schools invariably madness?

One other point: Mr. Wilkinson's lack of judicial temperament is a serious problem, but there are some serious questions in everyone's mind as to how Mr. Wilkinson has achieved the process of getting himself nominated.

It has been quoted in the press that he lobbied for this position. A congressional aide was quoted as saying he did everything but take out a billboard. This is especially distressing when, in editorial after editorial that Mr. Wilkinson wrote while at the Virginian-Pilot, he criticized the role of politics in judicial appointments.

But even all this lobbying does not explain why the American Bar Association has given the endorsement. By their own rules, it is not clear. I am not saying there is anything improper, but the committee must be aware that there is a longstanding connection between Justice Powell and Mr. Wilkinson.

He was the clerk for Justice Powell. The relationship of these two men is well known. Justice Powell's law firm represented the bank that Mr. Wilkinson's father headed. Mr. Wilkinson even worked at the Powell law firm in high school. After clerking with Justice Powell, Mr. Wilkinson wrote about Mr. Powell in his book, "Serving Justice," and said in that book that when Mr. Powell was appointed to the Supreme Court, Mr. Wilkinson felt the Supreme Court had been saved and: "I could not help thinking of my chances for clerkship."

This inside track to a judicial nomination runs counter to everything Mr. Wilkinson has written about merit appointments to the bench. Writing on the theme of merit versus raw political selection of judges was a recurrent theme.

He says: "Judges ought to be selected on the basis of merit and not on the basis of political ties." I could continue; it is all part of the record and part of Mr. Wilkinson's writing.

I would close in quoting Mr. Wilkinson when he said: "It is never too soon to begin stressing merit over connections," and we agree. Thank you.

The CHAIRMAN. Thank you. We will put your entire statement, if you have more, in the record.

Ms. HARRISON. Thank you.

[Material submitted for the record follows:]

PREPARED STATEMENT OF EDYTH C. HARRISON

Mr. Chairman, I am Edythe C. Harrison, a resident of Norfolk, Virginia, speaking for the National Women's Political Caucus. I am a past member of the Virginia General Assembly, and have been a community activist in a variety of projects in the arts, education, and community development for many years.

I came to know Mr. Wilkinson personally when he resided in Norfolk as the Editorial Page Editor of the Virginian-Pilot. I am well acquainted with his beliefs and modes of expression through his writings and personal conversations. I am here to comment on Mr. Wilkinson's judicial temperament as ~~believed~~ revealed in his own writings while at the newspaper and in his books.

It is with some uneasiness that I testify due to what I consider a good personal relationship with Mr. Wilkinson. However, as the Chair of the 2nd District Women's Political Caucus and as a concerned citizen, I feel obligated to share with this committee my knowledge on this appointment.

Mr. Wilkinson lacks experience representing clients whether in or out of court. He lacks experience either as a lawyer sweating out a case with a client whose life, liberty, or fortune are at risk, or as a judge called upon day after day to render discriminating opinions about often difficult matters. In view of these facts, it is more than relevant to consider his performance as an editorial writer to glean insight into this man as a journalist, lawyer and as a person. This is especially so, in view of the fact that Mr. Wilkinson cites his three years as an editorial writer in support of his experience for this appellate judgeship. I must ask if he was temperate in his judgments? Did his editorials reveal the writer as a person of depth, learning, and mature insight, or someone deficient in these qualities? Was he arrogant? Was his language precise and thoughtful? Did he enlighten as well as provoke? Did he liken his responsibilities in the post of

Editor to those of a judge, who must give due weight to all sides of a controversy, examine and state carefully the arguments on all sides of a controversy, and make his decision from the best evidence available to him?

Unfortunately, my conclusion is that Mr. Wilkinson falls short in all aspects. An editorial writer does what a judge does. Editorial writers, like judges, confront controversial issues and both should be fair minded, look at both sides of the question, and pose reasonable solutions. Since Mr. Wilkinson is relying heavily on his editorial experience as a basis for his appointment, it is appropriate that we look at his editorial writings for the qualities that would indicate judicial temperament. In evaluating his editorials we look for evidence of fair mindedness, compassion, and one who understands complexities and practical implications inherent in legal disputes.

A judge may be a political appointee but judges are not politicians. Mr. Wilkinson's style has the forensic tone of a campaigning politician or of an adversary lawyer in front of a jury, not the mediating tone of an impartial judge. His discourse suggests a pre-judgment that would obstruct his ability to judge fairly. Mr. Wilkinson obviously is intelligent and aware of the problems of this society. In his editorials he asks all the provocative rhetorical questions - often inflammatory in style but he offers no solutions to these problems. This is acceptable for a teacher or writer who can deal in hypotheticals, but it is not appropriate for a judge -- or even an editorial writer who must feel a responsibility to the community who looks to him for enlightenment -- but it is certainly not appropriate for a judge who must take responsibility for his words knowing they will become law.

His editorials cover a number of highly controversial subjects. A look at his editorial language tells us something about his ability to be fair minded. The issues are arguable. Mr. Wilkinson does not argue the case if arguing means weighing the arguments for and against and coming to one's own conclusions. His adversarial style forces the argumentation to move exclusively between two absolute extremes. I give a couple of examples: Through emotionally laden lexical choices such as, and I offer as direct quotes from his editorials the following language: "nightmares of the Holocaust; malignant mobs; stalking presidents; sanctity of innocent life; heinous crimes" he forces the reader into these extremes and then concludes that there is no other choice. This crystallization into two irreducibly opposed viewpoints is more the discourse of a lawyer than that of a judge. In fact, his adversarial rhetoric repeatedly defies logic. Indeed he deals ruthlessly with the very principles of logical argumentation, all the while maintaining a facade of logical structure.

Mr. Wilkinson is given to extravagant, misinformed, intemperate, inflammatory, stereotypic statements. For example: Regarding one minority group, Mr. Wilkinson very unsympathetically writes," their rhetoric was that of the maligned. The march urges an end to all social economic, judicial, and legal oppression of lesbian and gay people." "Their demands," said Mr. Wilkinson," "should be resisted because the last thing we need is a fresh wave of lawsuits whenever some employee is allegedly dismissed or passed over because of 'sexual preference.'" Does Mr. Wilkinson define justice in terms of a reduced caseload? Is justice a matter of convenience for the judges? Is this what we mean by judicial economy? All that most people ask of government is that they be accorded the same legal rights as other citizens, being held accountable for what they are as individuals, not because of their minority differences. This is a point that should not have to be explained to a man who may sit on the bench.

It should also not have to be explained that while it may be appropriate to support capital punishment, it is inappropriate to support capital punishment because, quoting Mr. Wilkinson, "I just don't trust parole agencies." That kind of injudicious statement casts aspersions on a whole class of hardworking public servants and is certainly a dubious reason for supporting this issue.

We all know what the problems are. As an editorial writer he inflamed us with the problems but never enlightened us with solutions or even attempts at solutions. A judge does not have the luxury of avoiding solutions to important, complex legal problems. Professors and editorial writers, for all the useful work they do, have the luxury of approaching problems from an ivory tower perspective. I am not an attorney but I understand why the American Bar Association requires a particular number of years out of school -- and legal practice for a number of years. I understand the reasons for this standard. Mr. Wilkinson's youth, lack of experience and immaturity are impediments to wise decision making.

On the most agonizing questions of race, education, and equal opportunity, Mr. Wilkinson offers not enlightenment, but empty rhetoric with a scholarly intellectual gloss which is useless as a guide to reasonable resolution of fundamental social problems.

"Compulsory busing is madness, compulsory busing between city and suburb is madness multiplied," writes Mr. Wilkinson. Is this the best thinking of a legal scholar who has explored the complex issues involved in dismantling separate but unequal racially identifiable schools? Is all busing 'madness?' Is busing in conjunction with paired and magnet generally upgraded schools, teaching and educational programs 'madness'? Is busing to remedy state caused inequities in the financial support of schools invariably madness? Is judicious busing, not for the purpose of racial balance but for the purpose of good libraries, good order, and good learning programs in all of a city or regions schools ' madness multiplied'?

In the controversial and highly emotional subjects of busing, capital punishment, bi-lingual education, and in vitro fertilization Mr. Wilkinson used the editorial page to confuse and inflame rather than explain. These are issues that beg for discourse and reason and not inflamatory rhetoric that never solves problems. Unfortunately these are not the only subjects that received the same type of treatment.

As if Mr. Wilkinson's lack of judicial temperament were not enough, there is some serious question as to how he achieved this nomination. Achieved is the right word because he engaged actively in the process of getting himself nominated. He lobbied for his own position. A Congressional aid was quoted, "he did everything except take out a billboard." This is especially distressing when in editorial after editorial, Mr. Wilkinson has been harshly critical of the role of politics in judicial appointments. But even all this lobbying does not explain the American Bar Association endorsement. By their own rules he is clearly not qualified but he received the endorsement anyway. It is generally understood that Justice Powell "permitted his name to be used" in support of Mr. Wilkinson's nomination and this may have turned the tables in so far as the ABA endorsement is concerned.

I am not saying there is anything improper, but the Committee should be aware there is a long standing connection between Justice Powell and Mr. Wilkinson. He was clerk for Justice Lewis Powell. The relationship of these two men is well known. Justice Powell's law firm represented the bank that Mr. Wilkinson's father headed. Mr. Wilkinson even worked at the Powell law firm in high school. After clerking, Mr. Wilkinson wrote about Mr. Powell in his book "Serving Justice" and said in that book that when Mr. Powell was appointed to the Supreme Court Mr. Wilkinson felt the Supreme Court had been saved and "I could not help thinking my chances for clerkship."

This inside track to a judicial nomination runs counter to everything Mr. Wilkinson has written about merit appointments to the bench. Writing on the theme of merit versus raw political selection of judges was a recurrent theme during his editorship. Concerning the selection of judges by the Virginia General Assembly he writes, "Judges ought to be selected on the basis of merit, not on the basis of political ties. At present, the choice of new judges rests, in practice, with the legislative delegations from jurisdictions involved. The temptations are great - at times irresistable to elevate to the bench the law partners, colleagues, and cronies of legislators." Mr. Wilkinson expressed hope that the proposed Bar Judicial Nomination Commission which would have been appointed by the Bar Association would provide a "high grade and less political review of the character, temperment, intelligence, mental and physical fitness, education, legal ability, experience, general interest and past conduct of each person considered." Mr. Wilkinson said, "It is never too soon to begin stressing merit over connections." We agree.

The CHAIRMAN. We thank you for appearing; we are very pleased to have you with us.

Now, we have two witnesses left, Mr. Roehr and Mr. DePriest. Which one wants to go first?

STATEMENT OF THOMAS DePRIEST, PRESIDENT, VIRGINIA GAY ALLIANCE

Mr. DEPRIEST. Mr. Chairman, I am Thomas B. DePriest, one of the founders and the current president of the Virginia Gay Alliance, a statewide organization of gay men and lesbians who are working to enhance our civil rights in the Commonwealth of Virginia. We presently have chapters in 5 of the State's 10 congressional districts. I am also an attorney and I am a member of the bar in both Virginia and the District of Columbia. And for your information, I do reside in Arlington, VA.

It is with some regret personally that I must urge the committee to reject the President's nomination of J. Harvie Wilkinson III to the Fourth Circuit U.S. Court of Appeals. I am a graduate of the University of Virginia Law School, where I took a class from Mr. Wilkinson.

He is extremely intelligent and personally charming. His classes were favorites among the students, and I suspect they are today as well. However, his teaching career and his editorials in the Norfolk Virginian-Pilot demonstrate that he lacks the judicial temperament which a circuit court judge must exercise on a regular basis.

For example, his editorial of October 16, 1979, written shortly after 75,000 gay people had marched up Pennsylvania Avenue here in Washington seeking full civil rights and an end to governmental discrimination based on sexual orientation, opposed the goals of the march because, to quote Mr. Wilkinson, "the last thing we need is a fresh wave of lawsuits whenever some employee is allegedly dismissed or passed over because of sexual preference."

He went on to confuse civil rights protection with approval or endorsement of, to use his phrase, "an incompatible sexual lifestyle."

Homosexuality, of course, is not incompatible with any other particular lifestyle. It is present throughout history, in every culture, in every segment of society. It is not even incompatible with heterosexuality, as gay fathers and mothers well know, even if Mr. Wilkinson does not.

In his editorial of January 4, 1981, Mr. Wilkinson trapped himself in the old right-wing illogic of the 1950's. He was disturbed that a homosexual employed at the National Security Agency was allowed to keep both his job and his security clearance as his sexual orientation became known.

Mr. Wilkinson concluded, "Homosexuals are, of course, capable of great loyalty and service to this country, but their sexual orientation poses unacceptable intelligence risks." Mr. Wilkinson in 1981 ignored the same obvious fact which Joseph McCarthy and his followers ignored in the 1950's.

A homosexual is a potential security risk only to the extent that he or she will suffer economic loss by the public revelation of his or her homosexuality. In a society which does not attach second-class political status to citizens because of their sexual orientation, the average homosexual poses no greater security risk than the average heterosexual.

Unfortunately, as his earlier editorial demonstrated, Mr. Wilkinson opposes any movement in this Nation toward full civil rights and equal treatment for gays. In other words, because Mr. Wilkinson wants to deny me my civil rights, since I am known to be gay, he would also deny me any opportunity for security or military employment as well.

I do not believe that Mr. Wilkinson represents the kind of pluralistic society which this Nation has sought to create since it began over 200 years ago. Mr. Wilkinson's editorials consistently illustrated his moralistic intolerance of any viewpoint other than his own.

His race, his sex, his economic and social status, his education—all of these combine to shape an individual who cannot understand what it means to be a second-class citizen in America.

Mr. Wilkinson, whatever his other qualifications, must not serve as one of the judicial guardians of minority liberties and freedoms. Indeed, we already know that he will not. If the courts do not protect what are, by definition, minority opinions, where can these minorities go for redress?

In addition, as you know, Mr. Wilkinson has no prior judicial experience. For that reason alone, this committee should oppose his nomination. His former employer, the Norfolk Virginian-Pilot, has refused to endorse his nomination for that very reason.

Clearly, our judicial system should function with only the most qualified and most dispassionate judges. The Fourth Circuit U.S. Court of Appeals is not the place from which Mr. Wilkinson should wage his ideological crusades.

Mr. Wilkinson was and remains, I am sure, a remarkable law professor. He was a provocative editorial writer. He is a charming individual, but he is unfit to hold the office for which he has been nominated.

The CHAIRMAN. Thank you.

Now, Mr. Roehr, I believe you are the last witness.

STATEMENT OF ROBERT JEFFERSON ROEHR, PRESIDENT, CAPITOL AREA REPUBLICANS

Mr. ROEHR. Yes, sir. Thank you very much, Mr. Chairman. I am very grateful for this opportunity here to speak before the Senate Judiciary Committee.

Capitol Area Republicans is a political organization of the Washington metropolitan area that represents gay Republicans who have served and continue to serve the Republican Party long and well in the District of Columbia, Maryland, and the State of Virginia.

As an example, I am a former congressional candidate, a member of the steering committee of the D.C. Reagan-Bush 1984 Committee, and an employee of the Republican National Committee. We as an organization seek what is best for our party and our country.

It is on this basis that we must oppose the nomination of Mr. Wilkinson. We certainly agree with the rest of the people who have spoken today on the lack of judicial and trial experience that Mr. Wilkinson has had. We feel no need to go further here.

We think it would be useful, though, to turn to what some other people have stated with regard to Mr. Wilkinson's nomination. Upon hearing of Wilkinson's consideration for the circuit court, James C. Roberts, past president of the Virginia State Bar Association, said, "We feel that they—experience as a judge and lawyer—are pretty important ingredients when a person is getting into that sort of position. I must say it—consideration of Wilkinson—comes as a surprise to me."

How did the State bar officially react to the Wilkinson nomination? Did it give Mr. Wilkinson its highest rating as being extremely well qualified? The answer is no. Did it bestow its second highest rating, the accolade of being well qualified for this position? Again, the answer is no.

Finally, after what was rumored to be some very heavy armtwisting on the part of Wilkinson patrons, the bar association did manage to concede Wilkinson as qualified for this position, though in light of his experience, I find that difficult to understand.

The senior Senator from Virginia, Mr. Warner, is not convinced of Mr. Wilkinson's qualifications. The Senator previously considered Mr. Wilkinson, but instead forwarded the names of three eminent Virginia jurists as his recommendations to the vacancy on the Fourth Circuit.

After the Wilkinson nomination was announced, Senator Warner stated a policy of extensive review and of no decision to support or oppose the nomination until the conclusion of these hearings. Clearly, Senator Warner is yet to be convinced of Mr. Wilkinson's qualifications.

The Virginian-Pilot was Mr. Wilkinson's employer for 3 years. They should know him well, but greeted the news of the nomination with the editorial, "Wilkinson as Judge?" and answered in the negative. The Pilot stated:

> On experience, however, Mr. Wilkinson comes up short. As a law clerk at the U.S. Supreme Court and as professor of law, he has learned the legal process, but that is not the same thing as actually participating in trials.

Our primary knowledge of Mr. Wilkinson comes through his editorials in the Virginian-Pilot. It is here that he has demonstrated a clear preference for what he perceives of as his personal preferences, at the expense of protecting the individual rights of those Americans who do not conform to his world view.

In a 1979 editorial entitled "Marching for Gay Rights," Wilkinson played havoc with the concepts of equality and equal protection under the law, which are the bedrock of our Constitution. He admitted the fact of discrimination against homosexuals, but denied remedy, in part because of process—"the last thing we need is a fresh wave of lawsuits"—and in part because of sociopsychological gibberish.

In this instance, Wilkinson did not hesitate to go outside the law and exercise a judicial activism in defense of his personal perceptions of traditional values.

We believe that a jurist should be totally committed to the concept of equality under the law and protection of minority rights within this framework. Mr. Wilkinson's editorials often seem to deny such a commitment.

We attempted to speak directly with Mr. Wilkinson to clarify questions raised by his writings. We thought then an editor who earlier wrote with regard to judicial appointments would have been open to this. Mr. Wilkinson unfortunately was not.

We hope, in conclusion, that both this committee and the full Senate will see fit to deny this appointment.

Mr. SHORT. Thank you very much, Mr. Roehr.

We will take a brief recess until the chairman can return.

[The committee stood in recess from 5:47 p.m. to 5:52 p.m.]

The CHAIRMAN. Mr. Wilkinson, you can come around now.

Senator Denton has a few questions here. If you could just answer those for the record, we will pass those to you.

TESTIMONY OF JAMES HARVIE WILKINSON III, NOMINEE, U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Mr. WILKINSON. Surely.

The CHAIRMAN. Now, you have heard these statements made by various witnesses and their charges. Do you care to rebut anything they have had to say?

Mr. WILKINSON. Well, Senator, the questions have mostly related to my experience.

The CHAIRMAN. Speak a little louder; I cannot hear you.

Mr. WILKINSON. I think the questions mostly related to my experience, and in the November 16 hearing I talked at some length about that and indicated that I thought my experience with two terms as a Supreme Court clerk, and my experience as a Deputy Assistant Attorney General of the United States in the Department of Justice, and my experience in the classrooms at the University of Virginia in teaching subjects with which I will be dealing on the court, and my experience, also, in writing a number of law review articles and in writing books on legal subjects, all combine to provide an experience that would enable me to do a very challenging job.

But I would just like to rest on the comments that I made in the November 16 hearing on that point.

The CHAIRMAN. In other words, you take the position that your experience as a law clerk to Justice Powell, your experience as a Deputy Assistant Attorney General, and your experience as a law teacher is adequate and is sufficient for an appointment of this kind?

Mr. WILKINSON. Yes, sir; I do.

The CHAIRMAN. Now, this is not a trial judge; that is true. For a trial district judge, it would appear that some trial experience would be almost essential. But this is an appellate court where you would just write opinions, and some people feel that it is not necessary to have the trial experience that you would have to have as a district trial judge.

But at any rate, I wanted to get your opinion and see what you had to say.

Mr. WILKINSON. Yes, sir.

The CHAIRMAN. We can pass it on to other members of the committee and the record will be available to them.

Now, is there anything else you would care to say?

Mr. WILKINSON. Well, just briefly, Senator Thurmond, I have only a brief statement. I just wish to assure the committee that my record on civil rights is one of moderation and one of goodwill, and I have left for the record a statement and accompanying documents to that effect this morning.

I also, Mr. Chairman, would like to thank those groups and organizations which have appeared today in the interest of airing their concerns, and I want to assure those groups and organizations that if I am confirmed, I will be a fair and openminded judge.

I think many of the organizations represented here today play a very active and important role in the judicial process, and I just want them to be assured not that I would always agree, but that I will certainly always listen, and that I will be as fair and openminded as I can be on every single case.

The CHAIRMAN. Well, I am sure they will be glad to hear that statement by you. Now, is there anything else you wish to say?

Mr. WILKINSON. No, Mr. Chairman. That would conclude my remarks.

The CHAIRMAN. Well, I think that concludes the hearings and we will now stand adjourned.

[Whereupon, at 5:57 p.m., the committee was adjourned.]

BIOGRAPHIES

PAULINE NEWMAN

NOMINEE, U.S. CIRCUIT JUDGE, FEDERAL CIRCUIT

Birth: June 20, 1927, New York City.

Legal residence: Pennsylvania.

Marital status: Single.

Education: 1944–45—Queens College; 1945–47—Vassar College, B.A. degree; 1947–48—Columbia University, M.A. degree; 1948–51—Yale University, Ph.D. degree; 1955–58—New York University School of Law, LL.B. degree.

Bar: 1958—New York; 1979—Pennsylvania.

Experience: 1951-54—American Cynamid Company, Research chemist; 1954 to present—FMC Corporation, Philadelphia, PA; 1961-62—Specialist, Science Policy Group, United Nations Educational, Scientific and Cultural Organization, Paris, France.

JAMES HARVIE WILKINSON III

NOMINEE, U.S. CIRCUIT JUDGE, FOURTH CIRCUIT

Birth: September 29, 1944, New York, N.Y.

Legal Residence: Virginia.

Marital status: Married to Lossie Grist Noell, 2 children.

Education: 1963-67—Yale University, B.A. degree; 1967-72—University of Virginia Law School, J.D. degree.

Bar: 1972—Virginia.

Experience: 1972-73—Law clerk, Hon. Lewis F. Powell, Jr., U.S. Supreme Court; 1973-78—University of Virginia Law School; 1973-75—Assistant professor of law; 1975-78—Associate professor of law; 1978-81—Landmark Communications, Inc., editor of the Norfolk Virginian-Pilot; 1982-83—Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice; 1983 to present—University of Virginia Law School, professor of law.

CONFIRMATION HEARING ON:

SARAH EVANS BARKER, HARRY L. HUPP, AND EDWARD J. GARCIA

WEDNESDAY, MARCH 7, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:11 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Robert J. Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The **CHAIRMAN**. The committee will come to order.

We meet today to consider certain appointments by the administration to the position of U.S. district judge. They are as follows: Sarah Evans Barker, of Indiana, to be U.S. district judge for the Southern District of Indiana; Harry L. Hupp, of California, to be U.S. district judge for the Central District of California; and Edward J. Garcia, of California, to be U.S. district judge for the Eastern District of California.

I believe Senator Quayle and Senator Lugar are both here to testify on behalf of Mrs. Barker. We will hear from them first, and then we will take the nominee.

STATEMENT OF HON. RICHARD G. LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator **LUGAR**. Mr. Chairman, it is with great pleasure that I introduce to you today Sarah Evans Barker, who President Reagan has nominated to serve as U.S. district court judge for the Southern District of Indiana. This is an important and historic occasion for me and for the State that I represent. If confirmed by this committee and the full Senate, as I certainly hope that she will be, Mrs. Barker will be the first woman to serve as a Federal judge from Indiana. Mrs. Barker has ably served as U.S. attorney for the Southern District of Indiana these past 3 years. She is definitely the most qualified man or woman in Indiana to serve for this position on the Federal bench. Not only will Mrs. Barker be an excellent judge, she will serve as an important symbol in the legal community and in our society that women deserve not just equal protection but equal advancement.

All of us have been working here in the Senate to promote women for more leadership positions in our institutions. Mrs. Barker's nomination more than fits that bill.

As you know, Senator Dan Quayle and I established a nonpartisan merit selection committee 3 years ago to review all Federal judge appointments in Indiana. The committee, chaired by former Governor Otis R. Bowen, reviewed the applications of numerous qualified attorneys throughout Indiana for the vacancy created by the death of Judge Cale Holder last year. Mrs. Barker was one of three persons recommended to the White House for the judgeship, and I believe the President made the best choice in nominating her.

As testimonial to that fact, when I had the opportunity 2 months ago to announce that the President was going to nominate Mrs. Barker, several hundred leaders from Indiana's legal, social service, and government communities turned out at an early morning press conference in good will and support. Judge S. Hugh Dillin voluntarily came forward to praise Mrs. Barker.

Mrs. Barker has been well trained for the Federal bench. A native of Mishawaka, IN, she received her bachelor's degree from Indiana University. She came to Washington first to work for the D.C. Board of Parole, and then for Congressman Gilbert Gude of Maryland. In the meantime, she received her law degree from George Washington University and was hired by our distinguished colleague from Illinois, Senator Charles Percy, to serve as staff attorney on the Permanent Committee on Investigations.

She then returned to Indianapolis, married Ken Barker, and began to practice law and to raise a family. I have had the pleasant opportunity to spend some time with Ken and Sarah, their three beautiful children, and with Sarah's fine parents. We are all very proud of her achievements, and I am sure this committee and the Senate will be impressed by her abilities.

I deeply appreciate this opportunity to introduce this nominee.

The CHAIRMAN. We are very pleased to have you here, Senator. Now we will hear from the junior Senator from Indiana.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you, Mr. Chairman. I just echo everything that the senior Senator from Indiana has said. I would emphasize a couple of points.

One, this is really a historic moment for us, both Senator Lugar and myself, in being able to recommend to this committee the nomination. We hope and anticipate that she will be confirmed, Sarah Evans Barker. It really is a great time because in Indiana she is the first woman who will serve on the Federal judiciary in the State of Indiana. She is obviously not the first woman in the Nation but the first in Indiana.

I want to underscore that the merit commission that Senator Lugar referred to gave her very high and excellent recommendation on her judicial background, her capabilities as serving as the U.S. district attorney in Southern Indiana. And her excellent legal credentials that she brings to the bench is the reason that she is being appointed and being recommended to this committee.

I believe that this is really, in a way, a generational appointment as well. She is 40 years of age. She will be there a long, long time, in all probability, probably longer than many in this room will be in the U.S. Senate, barring any unforeseen circumstances. So, I think that what we are doing is making an appointment that is going to have lasting impact on the State of Indiana.

They do have three children. As a matter of fact, they are almost the same age, Mr. Chairman, you might be interested, as the Quayle children: 9, 7, and 5 are mine, and we go in reverse order; we have two boys and a girl. I believe that they have two girls and a boy, 9, 7, and 4.

It is really a proud moment for me. I have a written statement that really gets into her credentials quite fully. In a way, this is sort of a welcoming back for Sarah. She served, as Senator Lugar pointed out, working for Senator Percy. So, Illinois has a vested interest in what Indiana does in this case. We welcome her back to Washington for a brief period of time to be, hopefully, confirmed in an expeditious and deliberate manner as I know you will exercise, Mr. Chairman.

She really will be a tremendous addition to the Federal judiciary. She has outstanding credentials. She will be a real asset to the legal community in Indiana, as has already been demonstrated by their public announcements and public support of this very fine nominee.

Thank you for the courtesy that you extended to us in your usual fine fashion. Thank you very much.

The CHAIRMAN. Thank you very much. We will hear from Mrs. Barker in just a few minutes.

I want to excuse these Senators. I know how busy they are. I got tied up a while ago and was delayed a few minutes.

I want to tell you, Mrs. Barker, that Indiana has two of the finest Senators here. You are to be congratulated for having the support of both of these gentlemen. Sometimes that is not the case. With their great influence and their great integrity and standing and stature here, I am sure you will have no trouble getting through.

We will hear from you in a few minutes, if you will have a seat in the back.

Mrs. BARKER. Thank you.

The CHAIRMAN. You Senators are excused, if you wish to go, or stay if you wish to remain.

Senator LUGAR. Thank you, Mr. Chairman.

Senator QUAYLE. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Wilson, I believe you have two nominees here: Mr. Hupp, of California, and Mr. Garcia, of California. You may proceed with either one you wish first.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. I appreciate greatly the opportunity and the privilege of appearing before your committee. I enjoy the task of introducing to you two exceptionally well qualified jurists, seasoned, experienced jurists who have been nominated by the President of the United States to serve upon the Federal bench in California.

Judge Edward J. Garcia has been nominated to the bench for the Eastern District, and Judge Harry L. Hupp for the Central District of California.

Listening to my colleagues from Indiana, who have had the wisdom to establish judicial qualification advisory committees, judicial selection committees, I was pleased and reassured. Having done the same thing and having been well served by four such committees in my State, I am pleased to report to the committee the results of their efforts. In each of the Federal judicial districts, several distinguished members of the bar have reviewed the credentials of outstanding applicants who have been recommended for appointment and who have themselves expressed interest in being judicial candidates.

I have taken great time and effort to study the results of the deliberations of these selection advisory panels. With respect to the current appointments, I consider that I am privileged today to present to you Judge Garcia for the eastern district and Judge Hupp for the central district. They are men of the highest personal and judicial caliber.

Judge Garcia is a native of Sacramento. He was appointed by Governor Reagan in 1972 as a judge of the Sacramento Municipal Court. He has been reelected to three subsequent terms and now serves as presiding judge of that court. Last year, the members of the Sacramento County Bar rated him the ablest municipal court judge in Sacramento. They characterized him as, "hard-working, an extremely knowledgeable jurist, a judicial conservative with a sharp tongue and a no-nonsense approach." I think that bespeaks a sharp mind as well. Judge Garcia has made the law a labor of love. He worked his way through night school at the University of the Pacific in Stockton, earning his degree with distinction in 1958. His professional background prior to assuming the bench includes 13 years in the office of the Sacramento district attorney, with 3 years as chief deputy district attorney.

Mr. Chairman, Judge Garcia has clearly demonstrated his abilities as a seasoned prosecutor, a distinguished attorney, an individual blessed with singular judicial temperament. He knows well both the law and how to make our system of justice work as it was hoped it would, with efficiency as well as with compassion.

Judge Harry L. Hupp of San Gabriel, CA, was also appointed by Governor Reagan in 1972 as a judge of the Los Angeles Superior Court.

Regarding Judge Hupp, let it suffice that attorneys practicing in this largest court system in the world, the Los Angeles County Bar, have chosen him as trial judge of the year and have universally found him to be a prodigous worker. He has impressed them both with the volume and the very high quality of his work on the bench.

Judge Hupp is a graduate of the Stanford Law School, having graduated in 1955 and served on the Stanford Law Review at that time.

While practicing law in the distinguished Los Angeles firm of Beardsly, Hufstedler, and Kemble for 18 years, he also served on school boards and on numerous boards of legal and community organizations. And Judge Hupp has attained broad judicial experience by serving in a majority of the trial departments of the Superior Court.

Mr. Chairman, my judicial qualification committee rated Judge Hupp to be by far the best qualified judge for appointment to the Federal court in the Central District. In fact, when one member of the bar was asked whether Judge Hupp had any defects, he responded, after a long contemplative pause: "Well, he smokes, and he is far too bright for that." I do not know whether he has continued smoking, but, Mr. Chairman, he and Judge Garcia are jurists of whom we can be very proud. They are superbly qualified for additional service to their Nation as members of the Federal bench. California and the country will benefit immensely from the talents of these exceptional people.

Knowledgeable observers say that Edward Garcia and Harry Hupp are among the very best talents that the legal profession in California has produced, the very best that can be offered to the Federal bench. I heartily agree. I encourage this committee to act promptly in reporting these nominations favorably to the full Senate.

Mr. Chairman, since you have indulged me on other occasions in different fashions, let me just say that I rarely adduce as evidence for the committee's consideration newspaper headlines; but there is one that I cannot resist and I am compelled to offer it. It says: "Wilson Makes Judicious Choices for Bench." In all candor, Mr. Chairman, I am compelled to agree.

I am very proud to present these two gentlemen to you today. Thank you for your courtesy.

The CHAIRMAN. We will be glad to put that in the record.

[Material submitted for the record follows:]

WILSON MAKES JUDICIOUS CHOICES FOR BENCH

Like clockwork, the judges appointed by each California governor become campaign issues every four years.

Are they tough enough on crime? Did they qualify merely by being the governor's cronies or big campaign donors?

But there is one redeeming factor in any governor's judicial appointments: Every six years, voters get a chance to turn the rascals out.

That's not true of federal judges. They are appointed by presidents for life. But presidents don't usually choose the majority of the judges they appoint.

Senators do. Each senator in the same party as a sitting president recommends prospective judges to serve in his or her state, and most presidents go along with the choices. No president has enough qualified personal acquaintances to fill all the district judgeships at his disposal.

The system has led to federal judgeships in California for such longtime political figures as Stephen Reinhardt, appointed by Jimmy Carter, and A. Andrew Hauk, a Lyndon Johnson appointee usually rated by lawyers as the worst federal judge in California.

That's why the three judicial appointments recommended so far by Republican Pete Wilson, California's newest U.S. senator are such eyebrow-raisers.

His three choices not only are apparently qualified, but none has any known previous political links to the senator.

The three:

—Alicemarie Stotler, a former Orange County Superior Court judge first appointed to the bench by former Gov. Edmund G. Brown Jr. This recommendation is remarkable because of Wilson's 1982 campaign commercials criticizing Brown's judicial appointments.

—Edward J. Garcia, a Sacramento Municipal Court judge first appointed by then-Gov. Ronald Reagan. Garcia, inactive politically for many years, has been ranked as the Sacramento area's ablest municipal judge by local lawyers.

—Harry L. Hupp, a 13-year veteran of the Los Angeles Superior Court. Also first appointed by Reagan, Hupp was chosen as trial judge of the year by attorneys practicing in Los Angeles, the largest court system in the world.

These appointments suggest that Wilson may be that rare bird: A politician who tries to keep at least some campaign promises.

His pamphlets in 1982 read like a do-gooder's delight. "As a U.S. senator, I will recommend tough judges who will put repeat offenders behind bars," said one tract. "I will base the appointments entirely upon merit."

Wilson obviously can't keep to the letter of that promise. Any choices he makes must be cleared with the Reagan administration before he announces them. That's why there are no Democrats among his picks. But the choices are a cut above the common run of blatantly political appointments.

Partly that's because of the screening committee Wilson set up soon after taking office. This group, similar to the one used by Democrat Sen. Alan Cranston during Democrat administration, is made up of lawyers Wilson trusts.

Their job is to pick candidates acceptable to both Wilson and Reagan who will not embarrass either the president or the senator on the bench or during the confirmation process.

"The screening is mostly ours," says a Wilson aide. "But of course we know what the White House is looking for. Still, we really are making a sincere effort to do this professionally, with as little cronyism as possible."

So far, not even the most dogmatic, party-line Democrats can have many quarrels with that statement. True, Cranston has no voice in the appointments. But then, he never gave his Republican colleagues a voice, either, when Democrats occupied the White House.

Given those conditions and the realities of political patronage, Californians could have been saddled with far worse judges than the Wilson choices.

The CHAIRMAN. Senator, thank you very much.

I want to congratulate these two nominees here, Mr. Harry L. Hupp, and Mr. Edward J. Garcia, upon their appointment here to be Federal district judges.

I want to tell you gentlemen that Senator Wilson is a man in this body who is held in high esteem. He has made very strong statements for both of you here today. And that will go a long way to help you get confirmed. We are very proud of the work he has done here. I do not know of any Senator who has come in in such a short time and made such an indelible impression on the Senate as Senator Wilson. So, you are very fortunate to have him to endorse you so highly.

We are going to excuse him now. I know he is busy.

Senator WILSON. Thank you very much, Mr. Chairman.

The CHAIRMAN. You gentlemen will please keep your seats. Mrs. Barker, please come up again. I will swear you all at once.

Do you solemnly swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. BARKER. I do.

Judge HUPP. I do.

Judge GARCIA. I do.

The CHAIRMAN. Mrs. Barker, would you care to introduce any of your family who are here?

Mrs. BARKER. Yes, I would, Mr. Chairman. I have my husband, Kenneth R. Barker, who is sitting here. He is a lawyer in Indianapolis.

The CHAIRMAN. Do you have any friends here you want to introduce?

Mrs. BARKER. I have several friends with whom I used to work when I was a Senate employee, some with Senator Percy. They are here in the audience.

The CHAIRMAN. We are glad to have all of you here.

Do you have any family here, Mr. Hupp, or friends you want to introduce?

Mr. HUPP. I do not, Senator.

The CHAIRMAN. Mr. Garcia, do you have any family or friends here you want to introduce?

Mr. GARCIA. Mr. Chairman, I have the same problems that Judge Hupp has. We received such short notice that I could not get my wife out of school, my son out of his job, and bring them down here with me. And my friends are 3,000 miles away.

The CHAIRMAN. We will proceed now. I will take you first, Mrs. Barker. Without objection, we will place your résumé in the record, which explains your education and experience.

TESTIMONY OF SARAH EVANS BARKER, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA

The CHAIRMAN. Mrs. Barker, you have served as U.S. attorney for the Southern District of Indiana since 1981, I believe. Do you feel this experience will be beneficial to you as a Federal judge?

Mrs. BARKER. Yes, sir, I do. Many of the functions that the U.S. attorney performs are quasi-judicial functions, in that you are passing on cases and making a decision as to whether or not they ought to be presented to the grand jury with a recommendation for indictment. Beyond that, the U.S. attorney serves as a unique sort of advocate in our system. It is not enough that the U.S. attorney be an adversary alone; you have to keep your eye on the need for impartiality, and that is certainly a hallmark of being a member of the judiciary.

The CHAIRMAN. Do you believe that it will be helpful to you as a district court judge to have a sentencing commission to establish uniformity in sentencing?

Mrs. BARKER. Yes, sir, I do.

The CHAIRMAN. We have included that in a bill passed by the Senate on sentencing.

Mrs. BARKER. Yes, I am aware that there are proposals pending. Without taking a specific position on those, I think it would be helpful. That is one of the most difficult functions that a Federal district judge performs. That sort of guidance that would bring about additional uniformity would be very helpful.

The CHAIRMAN. Mrs. Barker, what kind of guidelines should a judge follow in determining propriety of Federal intervention into State affairs?

Mrs. BARKER. I think guidelines that bring forth a certain restraint and considerable discretion. When the Federal judiciary moves into the arena of State law and State policymaking, it ought to be only under compelling circumstances, when the law requires it, and not for any other purpose.

The CHAIRMAN. Do you believe, as I interpret the Constitution, when the Union was formed that the States delegated certain powers to the Union and have reserved all other powers to themselves?

Mrs. BARKER. That is my understanding of history as well, Mr. Chairman.

The CHAIRMAN. Do you have any concern about strong advocates of public issues being appointed to the Federal bench?

Mrs. BARKER. I would have some concerns. I think one of the important functions of a judge is to give forth the appearance of impartiality and a certain detachment so that you can implement the law without regard to whatever philosophical or policymaking predispositions you have. It is not a bar, certainly, but it would be a matter that would raise concern. After all, it is important that the judge generate respect in the community.

The CHAIRMAN. Mrs. Barker, in response to a portion of the committee questionnaire concerning the characteristic of judicial activism, I believe you stated in part—and I quote: "These tendencies obscure the importance of the doctrine of separation of powers and erode the principle of stare decisis."

The separation of powers are powers delegated to each branch of government, legislative, executive, and judicial. And then they are separated from the division of powers between the Federal Government and the States. Do you adhere strictly to the Constitution on those matters?

Mrs. BARKER. I do, Mr. Chairman. The Constitution is the controlling law of the land, and I would.

The CHAIRMAN. Do you believe that the Constitution should be strictly construed?

Mrs. BARKER. Yes, I do, Mr. Chairman.

The CHAIRMAN. Mrs. Barker, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts, in your judgment, with the Constitution as that judge interprets it?

Mrs. BARKER. The principle of stare decisis is a guideline for decisionmaking, but the Constitution itself ought to prevail.

The CHAIRMAN. Thank you very much, Mrs. Barker. I want to congratulate you again on your appointment. I feel certain that you will be confirmed without any trouble. I wish you a happy tenure on the bench.

Mrs. BARKER. Thank you, Mr. Chairman.

The CHAIRMAN. Now we will take the others. Without objection, the résumé on Judge Hupp will be placed in the record.

TESTIMONY OF HARRY L. HUPP, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

The CHAIRMAN. Judge Hupp, you have served on the superior court of Los Angeles County for approximately 12 years, I believe.

Judge HUPP. That is correct, Mr. Chairman.

The CHAIRMAN. I believe this court is a trial court of general jurisdiction.

Judge HUPP. That is correct.

The CHAIRMAN. During this period, you have presided over many cases, I presume.

Judge HUPP. Yes.

The CHAIRMAN. I am confident that you are very knowledgeable of State laws. Do you foresee any difficulty in the transition from the State court to the Federal district court?

Judge HUPP. I do not see any difficulty, Mr. Chairman. It obviously is going to take study as to applicable Federal procedures insofar as they differ from the State, a study which I have already embarked upon.

The CHAIRMAN. Do you feel well versed in the Federal law?

Judge HUPP. I believe so. In California, many of our procedures and systems are very parallel to the Federal system. I do not anticipate any difficulty in acquiring the necessary knowledge to administer a Federal judgeship.

The CHAIRMAN. In reviewing your file, I noted that you received the Outstanding Trial Jurist Award from the Los Angeles County Bar Association in 1983, last year. You are to be congratulated for being the recipient of this award. I am confident that you are well thought of as a State court judge.

Do you believe litigants in State courts receive the same level of fairness, due process, and quality of justice as do litigants in Federal courts?

Judge HUPP. At least as California goes, which is where my knowledge is, yes.

The CHAIRMAN. I presume, of course, that you feel that they should receive equal treatment in either court.

Judge HUPP. I agree.

The CHAIRMAN. The same is true in any court.

Judge HUPP. I agree.

The CHAIRMAN. Judge Hupp, do you feel that a judge should assume direct control over complex issues in cases in order to avoid delays and to effectively manage such cases?

Judge HUPP. Yes. As a matter of fact, this is the style in our Central District of California. I agree with it. I think it has to be done in order to smoothly move the case load from filing to conclusion.

The CHAIRMAN. What are the standards that you use in deciding that the court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge HUPP. I am sorry, Senator, I did not hear that.

The CHAIRMAN. What are the standards that you will use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge HUPP. Obviously, you have to monitor the case as it progresses through your court. You have to get status reports at appropriate times, set up settlement conferences at appropriate times, in order for the court to keep current, making sure that case is moving from beginning to end.

The CHAIRMAN. You have been recommended very highly. You have an outstanding record. I feel certain you will make an excellent Federal district judge. I wish you success and happiness on the bench.

Judge HUPP. Thank you, Mr. Chairman.

The **Chairman**. You are now excused, if you wish to leave, or you can remain where you are.

We will take Judge Garcia next.

Without objection, your résumé will be placed in the record.

TESTIMONY OF EDWARD J. GARCIA, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF CALIFORNIA

The **Chairman**. Judge Garcia, you have been a judge in the Sacramento Municipal Court since 1972, I believe.

Judge **Garcia**. That is correct, Mr. Chairman.

The **Chairman**. This court, I understand, is a trial court of limited jurisdiction.

Judge **Garcia**. Yes.

The **Chairman**. It has jurisdiction over cases filed in Sacramento County where the civil or monetary claim does not exceed $15,000 and in misdemeanor or criminal cases where the penalty does not exceed 1 year in the county jail and a fine of $1,000.

I will ask you the same question that I asked Judge Hupp earlier. Do you foresee any difficulty in the transition from the State court to the Federal district court?

Judge **Garcia**. I foresee no difficulty, Mr. Chairman. However, it is going to take a lot more hard work to learn Federal procedure, which presently, I must confess, I am unfamiliar with.

The **Chairman**. Do you feel qualified to assume this new responsibility?

Judge **Garcia**. Yes, I do, because I had the same feeling of inadequacy 12 years ago when I was appointed to the municipal court. I learned that, just by working hard, long hours, and applying yourself, you can learn the business.

The **Chairman**. Judge Garcia, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared adequately to represent the interests of his or her client?

Judge **Garcia**. Unfortunately, that happens more often than we would like. In a criminal case, I think under State law it is my duty in California to protect the rights of the defendant. However, in a civil case if I was faced with that problem, I think you sink or swim in a civil case with the attorney that you hire; you can sue him later on for malpractice if you wish, but I would not interfere in a civil case under those circumstances.

The **Chairman**. Judge Garcia, I consider judicial temperament to be a prerequisite for a Federal judge. I have seen some Federal judges embarrass attorneys, embarrass jurors, embarrass witnesses, and flaunt their power. A Federal judge has almost unlimited power. I think people who have power ought to be the humblest people. How do you feel about judicial temperament?

Judge **Garcia**. I agree with that sentiment 100 percent, Mr. Chairman. Inside my bench is a little wall and behind it a little sign that the attorneys and litigants cannot see that I have had in front of me for almost 3 years now. It reminds me to be patient and courteous to the litigants and the parties. Whenever I find myself getting out of hand, I bite my tongue, look at my sign, and bring myself back to the ground.

The CHAIRMAN. Counsel just suggested you move that sign to the Federal court with you.

Judge GARCIA. I fully intend to, Senator. I have heard of federalitis.

The CHAIRMAN. Judge, the phrase judicial activism is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase judicial activism mean to you?

Judge GARCIA. Probably legislating from the bench, which I am against. I think that the courtroom is not the proper forum because of its limitations in receiving evidence and because you only have the interests of the litigants before you. It is not the place to implement or devise broad social policies. I think that is for the legislature.

The CHAIRMAN. The Constitution provides that the legislative branch makes the law, the executive branch administers the law, and the judicial branch interprets the law. Do you thoroughly agree with that conception of the Constitution?

Judge GARCIA. Yes. That is the true separation of powers. I think, however, the judiciary, in its role of testing laws against the Constitution, should do it with deference to the legislature and the executive branch of the government, which are more responsive to the public and the citizenry.

The CHAIRMAN. Judge, I feel you are well qualified to fill this position. I wish you success and happiness with your new responsibility after you have been confirmed.

We are very pleased to have all of you nominees here today. That now concludes the hearing.

[Whereupon, at 2:40 p.m., the committee was adjourned.]

BIOGRAPHIES

SARAH EVANS BARKER

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA

Birth: June 10, 1943, Mishawaka, IN.

Legal residence: Indiana.

Martial status: Married to Kenneth Ralph Barker, 3 children.

Education: 1961-65—Indiana University, B.S. degree;

1966-67—Marshall-Wythe, College of Law; 1967-69—American University Law School, J.D. degree.

Bar: 1969—Indiana.

Experience: 1969—Legislative assistant, Congressman Gilbert Gude, U.S. House of Representatives;

1969-71—Legislative assistant, Senator Charles Percy, U.S. Senate;

1971-72—Special counsel, Permanent Subcommittee on Investigations, U.S. Senate;

1972—Director of Research, Director of Scheduling and Advance, Senator Percy Re-election Camp;

1972-77—Assistant U.S. attorney Southern District of Indiana, (First Assistant 1976-77);

1977-81—Associate & Partner, Bose, McKinney & Evans;

1981 to present—U.S. attorney, Southern District of Indiana.

HARRY L. HUPP

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: April 5, 1929, Los Angeles, CA.
Legal residence: California.
Marital status: Married to Patricia D. Tibbetts, 4 children.
Education: 1947-50—Pomona College;
1952-55—Stanford University, B.A. degree, LL.B. degree.
Bar: 1956—California.
Military service: 1950-52—U.S. Army.
Experience: 1955-72—Associate, 1955-60, partner, 1961-72, Beardsley, Hufstedler & Kemble;
1972 to present—Judge of the Superior Court, Los Angeles County.

EDWARD J. GARCIA

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF CALIFORNIA

Birth: November 24, 1928, Sacramento, CA.
Legal residence: California.
Marital status: Married to Dorothy Gernhardt Garcia, 3 children, 3 step-children.
Education: 1949-51—Sacramento City College, A.A. degree;
1954-58—McGeorge School of Law, LL.B. degree.
Bar: 1959—California.
Military service: 1946-49—U.S. Army Air Corps.
Experience: 1959-72—Deputy District Attorney, Sacramento County District Attorney's Office, Supervising Deputy District Attorney 1964-69, Chief Deputy District Attorney 1969-72.
1972 to present—Judge, Sacramento Municipal Court District.

CONFIRMATION HEARING ON NEAL B. BIGGERS

WEDNESDAY, MARCH 14, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:11 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

OPENING STATEMENT OF CHAIRMAN STROM THRUMOND

The CHAIRMAN. The committee will come to order.

Today we have met to hold a hearing for the U.S. district judge in the State of Mississippi. Neal B. Biggers of Mississippi has been appointed by the President to be the district judge for the Northern District of Mississippi.

Senator Cochran is here at this time, and I know how busy he is. We are going to hear from you first so you can leave if you want to after that or stay if you wish. So you may proceed, Senator.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Thank you very much, Mr. Chairman.

Mr. Chairman, I am really pleased today to be able to present to the committee and introduce my good friend Neal Biggers, whom the President has nominated to be U.S. district judge for the Northern District of Mississippi.

Neal Biggers is one of the State's best trial judges. He serves as a circuit court judge in our State court system. He has so served for the past 9 years, and prior to that, he was a district attorney prosecuting cases in a district that includes a multicounty area.

Previously, he served as an attorney in private practice. In all of those positions, Mr. Chairman, he has distinguished himself and has stood out as one of the brightest and best young lawyers and judges we have produced in Mississippi.

He graduated from the University of Mississippi Law School. He was educated at Millsaps College, one of the fine liberal arts institutions in the South where he received a bachelor of arts degree.

He's from Corinth, MS, up in the northeast part of the State. He served in the Navy prior to going to law school. But in his entire career, Mr. Chairman, he has always been the kind of person who has been looked up to by fellow lawyers, by fellow judges and by the citizens of our State at large.

I am very proud to have been able to recommend him to the President for this nomination, and I am very pleased the President has acted on it as he has and submitted his name to the Senate.

I hope that the committee will review his qualifications and quickly recommend his confirmation to the Senate. I am convinced that because of his temperament, his good character, and his experience, he will serve with great distinction as a Federal judge.

With that, Mr. Chairman, I'll leave him in your hands.

Senator Stennis has submitted a statement and regrets that he could not be here. Senator Stennis supports the nomination fully and without reservation, according to his statement, and I ask that the statement be made apart of the record.

The CHAIRMAN. Without objection, Senator Stennis' statement endorsing Judge Biggers will go in the record at this point.

[Material submitted for the record follows:]

PREPARED STATEMENT BY SENATOR JOHN C. STENNIS

Mr. Chairman, I am pleased to express my full and complete support for the nomination of Neal B. Biggers to be United States District Judge for the Northern District of Mississippi.

I know Judge Biggers personnally and am familiar with his record of highly professional conduct on the bench in Mississippi. He has been a judge in the trial court of general jurisdiction in my state for the past nine years.

Judge Biggers' performance has earned the respect of the attorneys who have appeared before him. The people in his community know him to be a man of high character and integrity.

I have talked at length with him about his duties as a federal judge, and am fully satisfied that he not only has the capacity but also has the dedication and devotion to duty that go with this highly important office. He is worthy of this trust and will bring honor to himself, to the office that he holds, and to the State of Mississippi.

I am supporting his nomination fully and without reservation.

Senator COCHRAN. Mr. Chairman, with your permission, too, I would like to introduce to the committee Judge Biggers' wife Joanne, who is here with us today.

The CHAIRMAN. We are glad to have you with us.

Senator COCHRAN. They are also the parents of a daughter Sherron, who is 20 years of age. She is not here today.

The CHAIRMAN. How old is their daughter, did you say?

Senator COCHRAN. Twenty years of age. She is as pretty as her mamma, too, Mr. Chairman.

The CHAIRMAN. I was going to say her mother does not look like she is much over 20 years old herself.

Senator COCHRAN. Mr. Chairman, thank you very much for the indulgence of the committee. At this time, I need to go Chair another committee that is in session. With your permission, I will do that.

The CHAIRMAN. Judge Biggers, I just want to say before he leaves that you are to be congratulated on having such a highly respected Member of this Senate to recommend you for this place.

Senator Cochran, a comparatively new Senator in the Senate, is held in high esteem by his colleagues, and he is held in high esteem by the President and the members of this administration.

The fact that he has endorsed you will practically insure your confirmation.

Judge BIGGERS. Thank you. Mr. Chairman.

The CHAIRMAN. I am very pleased that Senator Stennis has also endorsed you. Of course, Senator Stennis has been here a long time and is highly respected also.

At this time, we will excuse Senator Cochran, if he wishes to go.

And if you will stand up now and be sworn.

Do you swear that the testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth so help you God?

Judge BIGGERS. I do.

TESTIMONY OF NEAL B. BIGGERS, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF MISSISSIPPI.

The CHAIRMAN. In October 1983, I received a letter from Mr. Robert Copeland president of the Alcorn County branch of the NAACP in which he requested an opportunity to appear before this committee and testify on the nomination of Judge Biggers.

Subsequent to that, I received a followup letter from Mr. Copeland which I will now, without objection, enter into the record.

Mr. Copeland's letter reads as follows:

> Dear Senator Thurmond.

It is addressed to me as chairman.

> The record will show that I have previously sent you a letter regarding the nomination of Neal B. Biggers, Junior, for a U.S. District Judge in Northern Mississippi wherein I stated my opposition to his nomination and requested to testify in front of the Committee. Additional investigation to the court records here in Alcorn County, MS, along with my personal interviews, have led me to believe that my earlier opinion was, perhaps, premature. The purpose of this letter is to retract my previous one and to let you know that I am now of the opinion that Judge Biggers will be a fair and impartial Federal judge.

That is signed by Robert F. Copeland.

Judge Biggers, I believe you served as a district attorney for the first judicial district of Mississippi from 1968 to 1975.

Judge BIGGERS. That is correct, Senator.

The CHAIRMAN. Since that time, I understand you have served as a circuit court judge for the same district.

Judge BIGGERS. Yes, sir.

The CHAIRMAN. And that you are still serving in that capacity, I believe.

Judge BIGGERS. Yes, sir.

The CHAIRMAN. I am confident that you are very knowledgeable of State laws. I am just wondering if you foresee any difficulty in the transition from the State court to the Federal district court.

Judge BIGGERS. Senator, I really do not. The Federal rules of civil procedure and the Mississippi State rules of civil procedure are identical; and of course, the constitutional law in the criminal area is the same whether you are in State court or Federal court.

The only difference that I see that I would be involved with in Federal court that I am not involved with now would be certain civil constitutional questions that come up, and they are not areas that I think would cause any great difficulty.

I think I can learn them. I am never going to know all the law. I think I will always be learning every week something new and I do not foresee any problem with learning this area also.

The CHAIRMAN. Judge, in response to a portion of the committee questionnaire concerning judicial activism, you stated in part, "The legislative branch of Government is better equipped to determine policy matters. The role of an administrator or watchdog over other institutions would better be left to other areas of the government."

Now, what are the standards that you will use in deciding that your court might have a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge BIGGERS. One standard that I think would be applied, Senator, would be a case in which there is no other governmental agency to insure that the order is carried out other than the court.

For example, there is a case now, *Gates* v. *Collier*, in the Federal courts in Mississippi involving a continuing watchdog study of the State prison system. In that case, a few named plaintiffs came in and objected to conditions there.

The court granted the relief that they prayed for and held that the State was to make continuing reports to the court concerning whether or not the system was being changed to abide by the orders of the court.

In that instance, that's an example where it seems to me that there is no other governmental agency that can insure that those orders are going to be carried out other than the court itself.

But if there is any other governmental agency that could be an overseer of courts' orders, I think they should do it.

The CHAIRMAN. Now, some Federal judges have practically taken over the running of certain State institutions, taken over the running of schools and other matters which many feel are reserved under the Constitution to the States of the Nation, because all powers not specifically delegated to the Union are reserved to the States under the Constitution.

How do you feel about matters of this kind?

Judge BIGGERS. As I stated in the questionnaire, I believe that the courts are not best equipped to be administrators and overseers. As Justice Jackson said one time, we must presume that there are other governmental agencies besides the courts that have the capacity to govern.

In my opinion, the legislative branch is better equipped to establish policy and to see that that policy is enacted than are the courts. The courts, in my opinion, are not equipped to be overseers and administrators. They are there in my opinion, the primary function of a court is to settle a dispute that is brought before it between parties, and once that dispute is settled, the case is disposed of.

The CHAIRMAN. The Constitution provides that we have the three branches. The Congress to make the law, the executive branch to administer the law, and the judicial branch to interpret the law.

Do you feel that the judicial should confine itself to the way the Constitution set it out?

Judge BIGGERS. Most of the time, yes, sir. Of course, if it is clear what the Constitution meant and what the writers of the Constitution had in mind, then all the times it should confined to that.

Certainly in some instances, I feel that we have areas that we are involved in now in Government that the writers of the Constitution never had the slightest idea that the Government would be involved in now.

For example, interstate commerce, the clause dealing in interstate commerce is an example. I am sure the writers had no idea back in 1787 what was going to be involved in interstate commerce in 1984.

But if it is clear, if the meaning is clear, I lean toward the strict construction of the Constitution.

The CHAIRMAN. I am glad to hear you say that.

I believe there was a decision handed down a few years ago by the Interstate Commerce Commission in which they held a man who is running an elevator in a building to just haul people up and down the building was in interstate commerce simply because some of the businesses in that building did business in interstate commerce.

To me, such a holding is ridiculous, and it seems to me we ought to observe the intent of the framers of the Constitution. If we do not like that, then move to amend the Constitution but not try to do it by statute or cointerpretation.

Do you agree with that?

Judge BIGGERS. I agree with it, Senator.

The CHAIRMAN. Now, judge, on some occasions I have observed that some Federal judges have been rather overbearing. I have seen some in the courtroom that many people felt were overbearing, discourteous to witnesses, to jurors, to lawyers, and there is really no excuse for this. I think it is a lack of good judicial temperament.

How do you feel about that?

Judge BIGGERS. I feel that it is a lack of judicial temperament and to some extent just common courtesy. It has always been my attempt to decide a case on the merits of the case, on the issues involved, on the law and on the facts that are presented and not on the personalities of the people who are involved in the case.

We all have our humanity and there are some people who come before the court that we like. Some people who come before the court that we might not like personally, but I have always tried, and I think any judge should set that aside and decide the case on the merits that are there and not on the people who are involved.

The CHAIRMAN. In 1980, prisoner petitions comprised approximately 14 percent of all U.S. district court civil litigation filings. Various proposals have been made to limit collateral attacks on convictions including additional requirements calling for complete exhaustion of State remedies, time limitations on the filing of petitions and eliminating master's authority to hold evidentiary hearings.

As I stated earlier, you have been a prosecutor and now serve as a State court judge. With this background, do you feel there is a need to alter the degree of access to Federal courts by State prisoners, and if so, what recommendations in this area would you make?

I might say we recently passed a bill here in the Senate, habeas corpus, to limit the time of appeal for cases that have gone through all the State courts, and I believe it allows one year for any other appeal in the Federal court. The rise in the Federal court I believe is a 2-year period.

There has to be an end to this litigation, and not just on and on and on. I was just wondering from your experience as a prosecutor and a judge how you feel about it.

Judge BIGGERS. Well, Senator, we see eye to eye on that. I have felt frustrated over the years with cases that never seem to end. I think the harshest criticism that the judicial branch of Government in this country faces now results from the laymen who look at the cases and they say there is no end to them, and they cost too much. It costs too much to process them, and they never end.

It would appear to me that as far as this area of State prisoners having access to the Federal courts is concerned that the Congress, who I suppose will be the ones that would have to do it, would serve the country well in coming up with a solution to this problem of double appeals that we have, and I do not know how it could be done.

However, one possibility that comes to mind is creating a special Federal court. Of course, in a criminal case in State court, once the supreme court of the State decides that case and it passes on the constitutional questions, it can be appealed from there to the U.S. Supreme Court.

As you know, because of their tremendous workload, in 99 percent of the cases the U.S. Supreme Court denies certiori. In doing that, they do not pass on the Federal questions, and it leaves open the possibility of the defendant coming back up through the Federal district court through these habeas corpus hearings.

I recently had a case that I was involved in that was 10 years old before it was finally disposed of, a criminal case, and that is just too long.

One possibility that I have heard mentioned, which would have to be an enactment of Congress, would be to establish some kind of a special intermediate court of appeals to which the State prisoners would appeal to after affirmance by the State supreme court; and that court of appeals would decide the Federal questions that are brought before it on that case.

From that court of appeals, then it would go to the U.S. Supreme Court, and if the Supreme Court denies certiorari, then the Federal questions have been decided. The defendant has had his day in court, access to the Federal courts, and it has been decided, and he would not, thereafter, have the opportunity to start down at the Federal district court level and go all the way back up the ladder again.

THE CHAIRMAN. Sometimes a judge may have a certain feeling of conscience or sense of justice in one direction but it may conflict with the clear meaning of a statutory or constitutional provision.

I presume you would resolve that in favor of the clear meaning of the constitutional provision or the statute, even though it would not be your feeling if you were making the law?

Judge BIGGERS. I would, Senator. Of course, you take an oath to uphold the Constitution of the United States and the laws thereof. I think that takes precedence.

The CHAIRMAN. Well, I hope you enjoy your service on the bench. Again, I want to say that you are fortunate to be endorsed by very highly respected Senators here, Senator Cochran and Senator Stennis. I have been in the Senate with Senator Stennis for a long time and there is no one respected here higher than he is, and Senator Cochran has made a very fine impression since he has been here, and I am very pleased that you have the endorsement of both of these gentlemen.

Judge BIGGERS. I am, too, Senator. They both were outstanding lawyers before they got here and I know they have a great respect for the law and that makes their recommendation more meaningful to me.

The CHAIRMAN. Do you have anything else you want to say?

Judge BIGGERS. No, sir.

THE CHAIRMAN. That concludes the hearing.

[Whereupon, at 2:33 p.m., the committee adjourned at the call of the Chair.]

BIOGRAPHY

NEAL B. BIGGERS

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF MISSISSIPPI

Birth: July 1, 1935, Corinth, MS.

Legal residence: Mississippi.

Marital status: Married to Jo Anne Abernathy Biggers, 1 child.

Education: 1953-55—University of Mississippi; 1955-56—Millsaps College, B.A. degree; 1960-63—University of Mississippi Law School, J.D. degree.

Bar: 1963—Mississippi.

Military service: 1956-60—U.S. Naval Reserve.

Experience: 1963-68—Private practice; 1968-75—District attorney, First Judicial District of Mississippi; 1975 to present—Circuit court judge, First Judicial District of Mississippi.

CONFIRMATION HEARING ON:

ROBERT R. BEEZER, H. RUSSEL HOLLAND, AND EDWARD C. PRADO

TUESDAY, MARCH 20, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We had some emergencies to arise here to detain us a few minutes.

Today, we are met to consider the nomination or Robert R. Beezer, of Washington, to be U.S. circuit judge for the ninth circuit, and H. Russel Holland of Alaska, to be U.S. district judge for the District of Alaska, and Edward C. Prado, of Texas, to be U.S. district judge for the Western District of Texas.

I believe we have some distinguished Senators here this morning. You are here, I presume, in the interest of Robert R. Beezer to be a circuit judge. Is that correct?

Senator Gorton. That is correct, Mr. Chairman.

The Chairman. We have the able and distinguished Senator from Washington here, who has only been here a few years, but he is now the senior Senator, and we are very pleased to have him, an able former attorney general and an excellent Member of the Senate.

We will be glad to hear from you now, Senator.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Gorton. Thank you, Mr. Chairman. Senator Evans and I are both pleased and honored to introduce Mr. Robert R. Beezer of Seattle to this committee.

Mr. Beezer is President Reagan's nominee for a vacancy on the U.S. Court of Appeals for the Ninth Circuit. Mr. Beezer is a partner in one of the most prestigious law firms in the Northwest, Schweppe, Krug, Towsend & Beezer. He is a past president of the Seattle-King County Bar Association, a former governor of the

Washington State Bar Association, and is named in the publication "The Best Lawyers in America."

His active participation in the legal community of the State of Washington will serve him well as he undertakes the difficult task of filling the position held by my distinguished friend, the Honorable Eugene Wright who, until his recent transfer to senior status.

Mr. Chairman, I wish Mr. Beezer well in that challenge. I am confident that he possesses the talent necessary to meet it in a highly distinguished fashion.

Now, I would yield, if I may, to my colleague, Senator Evans.

The **Chairman**. We are very pleased to hear from the able junior Senator from Washington, Senator Evans.

STATEMENT OF HON. DANIEL J. EVANS, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator **Evans**. Thank you, Mr. Chairman. I would like to second the remarks of my colleague from Washington. I have known Bob Beezer for many, many years. In fact, in reminiscing, I remember very well that as a candidate for the State legislature more than a quarter of a century ago, his father, Arnold Beezer, another distinguished attorney from Seattle, was one of the leaders of that legislative district and of great assistance to me during my first campaign.

I am confident Mr. Beezer has the qualifications not only for the task he faces, but the ability to become a distinguished jurist. He is someone who will represent not only the State of Washington, but the United States, exceedingly well on the Ninth Circuit Court of Appeals.

The **Chairman**. Mr. Beezer, I congratulate you upon having the support of your Senators, and I can assure you that this will go a long way in your confirmation.

We thank you Senators for being present. You may stay, or leave, whichever you prefer.

We will have the Senators from Alaska next. Senator Stevens, I notice, is here, and Senator Murkowski. Do you want to come around with Mr. Holland?

We are very pleased to have our able and distinguished assistant majority leader here, and we will be pleased to hear from him at this time. Senator Stevens.

Senator **Stevens**. Thank you very much, Mr. Chairman.

Let me put my full statement in the record, if you will.

The **Chairman**. Without objection, your entire statement will go in the record.

Senator **Stevens**. It is a real privilege to introduce to you Russel Holland, with whom I practiced law prior to coming to the Senate, and I will say to my good friend, the Chairman, that I don't think any Senator has ever done what I did. I just walked away from my law firm and completely trusted Mr. Holland to be totally honest and open with me in handling all of the disbursements of funds and the handling of the cases that came in. I didn't sell him the firm, he just acquired it.

He has done extremely well. He treated me as he has every other member of the bar and the public, in an honest, and open and frank way, and he has been selected from a group of candidates upon whom the Alaska Bar Association conducted a survey. In that survey, it was apparent that Russ' colleagues thought highly of him, and we are most pleased that the President recognized these qualities and nominated him for this judgeship.

So I want to tell you that without qualification Russel Holland will be a very distinguished U.S. judge.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR TED STEVENS

Mr. Chairman, I want to thank you and other members of the committee for scheduling the hearing today on Mr. Holland's nomination. I realize the considerable time constraints you and other members of the committee have been operating under in recent weeks. I especially want to thank you, Mr. Chairman, for all your assistance in expediting the review of Mr. Holland's nomination.

Members of the committee, today it is my pleasure to introduce to you Russ Holland, who is the President's nominee to the United States District Court for the District of Alaska. The Alaska delegation solidly supports this nomination. Mr. Holland is from Anchorage, Alaska, and he is well known and well regarded as a trial lawyer in our State. Mr. Holland has been a member of the Alaska bar since 1963. He was an assistant United States Attorney in Alaska from 1963 through 1965. He obtained his education, both undergraduate and graduate, at the University of Michigan.

Mr. Chairman, I can speak from personal experience that Russ' knowledge of the law and his lawyering skills are excellent. More importantly, however, is the judicial temperament I believe he will bring to the Federal bench, Russ feels as I do that judges are better off executing the law rather than rewriting it. I know he won't hesitate to do the best job that he can in balancing the collective interests of our society against those of individuals, but he will at the same time exercise the type of judicial restraint that I believe is now needed in our Federal court system.

Again, Mr. Chairman, it gives me great pleasure to introduce to you an Alaskan that I, Senator Murkowski and all of Alaska are very proud of, Mr. Russel Holland.

The **CHAIRMAN**. Thank you very much, Senator. We are honored to have you before this committee.

Now, we will be glad to hear from the able junior Senator, Senator Murkowski.

STATEMENT OF HON. FRANK H. MURKOWSKI, A U.S. SENATOR FROM THE STATE OF ALASKA

Senator **MURKOWSKI**. Thank you, Mr. Chairman.

I join with my colleague, the senior Senator, Senator Stevens, in supporting the confirmation of Russ Holland for U.S. district judge in Alaska. Russ has practiced law in excess of 20 years, and certainly has distinguished himself as a fair and honest attorney who has always provided the very highest standard of legal service to his clients.

He is known in my State as an industrious and thoughtful individual, and he will certainly make an excellent addition to the Federal judiciary.

I very much appreciate the opportunity to appear in support of the confirmation of my good friend and distinguished Alaskan, Russ Holland, for U.S. district judge.

I thank you.

Senator **STEVENS**. Mr. Chairman, if you will let me put one other matter on the record, that is, we have very few district judges, as you know, in Alaska, and the incumbent is stepping down and is going to leave the State for a substantial period of time. I am most hopeful, we are most hopeful, that we will be able to move Mr. Holland's nomination along so that we will have two sitting judges at all times in Alaska.

We will be pleased to work with the chairman and the members of the committee in any way to see to it that that takes place following the committee's determination, of course, of his qualifications.

The **CHAIRMAN.** Senator, we will put him on the agenda for the next meeting, which will be Thursday of this week. At that time, we hope to have a quorum, and we can get him confirmed by the committee. Thank you, Senator. We are glad to have you with us, and I want to say, Mr. Holland, that you are fortunate to have the full support of both your Senators. They are both held in high esteem here. We hope to act on your nomination in a very expeditious manner. We are very pleased to have you.

If you Senators want to stay, you may, although if you have to leave, I know you are busy. We will question him in a few minutes.

Thank you.

Senator **STEVENS.** Thank you.

Senator **MURKOWSKI.** Thank you very much.

The **CHAIRMAN.** I see the senior Senator from Texas is here, Senator Tower. I believe you are here, Senator, in the interests of Mr. Prado of Texas. We will be glad to hear from you.

STATEMENT OF HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **TOWER.** Thank you very much, Mr. Chairman. I appreciate the opportunity to appear this morning and present to the committee Edward Charles Prado of San Antonio, TX, the President's nominee to be a Federal district judge for the western district of Texas.

I would like to submit my entire statement for incorporation into the record, if I may.

The **CHAIRMAN.** Without objection, your entire statement will go in the record.

[The prepared statement of Senator Tower follows.]

PREPARED STATEMENT OF SENATOR JOHN TOWER

Mr. Chairman, I am pleased and honored to introduce to you today Mr. Edward Charles Prado, who has been nominated by the President to the U.S. District Court for the Western District of Texas.

Ed Prado is a native of San Antonio, where he is well-known and respected. After graduating from Edgewood High School, Mr. Prado attended San Antonio Junior College and the University of Texas at Austin, where he received his Bachelor of Arts degree. He then entered the University of Texas School of Law from which he received his Juris Doctor degree in May 1972.

Upon graduation from the University of Texas, he was commissioned as a Second Lieutenant in the U.S. Army, having been named Distinguished Military Graduate at the University. Mr. Prado served as an infantry officer and is presently a Captain in the U.S. Army Reserve on inactive status.

In addition to his impressive academic and military record, Mr. Prado has also had considerable experience in the legal profession. In 1972 he served as Assistant District Attorney for Bexar County, prosecuting primarily criminal matters. In 1976 he was named Assistant Federal Public Defender for the Western District of Texas and served in this capacity for four years, thus giving him extensive experience on the defense side of the Federal docket. During his service in this capacity, he was selected as Outstanding Federal Public Defender.

In February, 1980, Mr. Prado was appointed as a State District Judge in Bexar County. The honors which he received during the 1972 to 1980 period are indicative of his competence and the enormous respect that he has earned from his colleagues and community.

He was named outstanding Young Lawyer of San Antonio, in 1980, and also received the U.S. Attorney General's Achievement Award and the LULAC National Conference Award for Meritorious Legal Service.

In 1981, the President nominated Mr. Prado as U.S. Attorney for the Western District of Texas, a position which he now holds and which he has held with distinction since his nomination and confirmation by the Senate. Indeed, his integrity and expertise as an attorney, coupled with his devotion to the legal profession and his community, are demonstrative of all the qualities necessary in a member of the Federal bench. Further, he possesses that sort of judicial temperament that would greatly enhance our Federal judicial system.

Mr. Chairman, in my view if Mr. Prado is confirmed by the Senate, he will bring these same outstanding qualities to the Federal bench. He has demonstrated fairness and adherence to the precepts of the Constitution, an intimate knowledge of the law, and compassion for his fellow human beings. Should he be confirmed, I am confident of his ability to assume this important position.

Mr. Chairman, this nomination signifies the commitment of this Administration to appoint the most qualified jurists to our Federal judiciary, I believe that Edward C. Prado can and will fulfill the enormous responsibility of providing a fair and impartial system of justice, a right guaranteed by our Constitution to all of our citizenry.

Therefore, I recommend without reservation that you approve the nomination of Edward Prado to this important position.

The CHAIRMAN. If you care to say anything in addition, we will be glad to hear from you.

Senator TOWER. Mr. Chairman, this young man was chosen from a field of very outstanding potential candidates for the Federal judgeship in the western district of my State. He is a distinguished graduate of the University of Texas Law School, and has been engaged in private practice. He has served as a public defender, a State district judge, and currently serves as the Federal district attorney for the Western District of Texas.

This young man is qualified in every way for the position to which he has been nominated. He is very fairminded, evenhanded, and I believe, very importantly, possessed of an excellent judicial temperament.

He has very, very strong support from his fellow members of the bar, and I recommend him for confirmation without any qualification or reservation.

I might add, knowing that you are interested in such matters, Mr. Chairman, that he is also a Reserve captain in the Army of the United States, having served as an infantry officer in the Army, and has that rich aspect of his background.

I would like to somewhat echo the words of Senator Stevens and urge that this appointment be confirmed as expeditiously as possible. We have a very, very crowded docket in the Western District of Texas. We deal with quite a lot of criminal matters, including drug trafficking, in that particular district. So it is a very heavily laden docket, and I think the interests of justice would be well served if he could be expeditiously confirmed.

Again, Mr. Chairman, I thank you for the opportunity to appear, and I am very proud and pleased, and consider it a personal honor, to strongly and without reservation or qualification recommend this young man for the position of judge of the Federal Western District of Texas.

The **CHAIRMAN**. Thank you very much, Senator. We are glad to have you here.

I want to congratulate Mr. Prado for having your fine support. Mr. Prado, you have got the support here of one of the most powerful men in Washington, Senator Tower. Unless something shows up we don't know about, you will have no trouble getting confirmed, I am sure. We will put you on the agenda for next Thursday, so your nomination can come up at that time.

Thank you, Senator, for your presence.

Senator **TOWER**. Thank you, Mr. Chairman.

The **CHAIRMAN**. If you want to stay, feel free. If you don't, I know you are busy, and you may leave.

Senator **TOWER**. I don't know that my staying would help him any, because he can answer the tough questions a lot better than I can. He doesn't need any coaching from me. Thank you, Mr. Chairman.

The **CHAIRMAN**. We will now take up the nominations in the order in which they came up. Mr. Beezer will come first, and Mr. Holland and Mr. Prado.

If all three of you gentlemen will stand, I will swear you at the same time.

Do you solemnly swear the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

Mr. **BEEZER**. I do.

Mr. **HOLLAND**. I do.

Mr. **PRADO**. I do.

The **CHAIRMAN**. All right. We will take Mr. Beezer first. Your biographical material will be placed in the record.

Mr. Beezer, do you have any family or friends here you want to introduce?

TESTIMONY OF ROBERT R. BEEZER, NOMINEE, U.S. DISTRICT JUDGE, NINTH CIRCUIT

Mr. **BEEZER**. Yes, Mr. Chairman, I would like to introduce to you my wife, Hazlehurst.

The **CHAIRMAN**. Is that your wife, or your daughter, standing up back there?

Mr. **BEEZER**. I do have some friends both from the District of Columbia Bar and from the Washington State Bar who are in attendance, and I will not introduce them individually.

The **CHAIRMAN**. We are very pleased to have you all with us.

I am interested in the judicial temperament of a man who goes on the Federal bench. I have seen some Federal judges intimidate lawyers and witnesses and jurors, and I think it is just entirely uncalled for.

How do you feel about the attitude of a Federal judge, what it should be in dealing with others in the courtroom?

Mr. **BEEZER**. Mr. Chairman, I feel very strongly that courtesy is a virtue that should be possessed by all of us. There is really no excuse for being rude to counsel, to the parties, court personnel, clerks, and others who are part of the judicial process. I would expect to conduct myself in judicial life as I have tried to do with my own clients, my associates, and partners, in the office, the office staff and help and clerks, and that is to be guided by the principle of courtesy.

I think that will take one a long way in terms of the conduct of judicial business.

That, however, is not to say that courts aren't governed by rules which require adherence, and in turn firmness.

In applying rules, one can do so courteously and at the same time be firm about it, and certainly not be publicly critical of young attorneys, of practitioners that are trying their first case or making their first arguments before the court, and do what can be done behind the scenes to encourage more education and more quality for practitioners, but not to engage in public criticism which has been quite rampant in the press of late.

The CHAIRMAN. I have got 20 minutes here to hear from you three judges, so if you all will make your answers as short as you can, we will appreciate it.

Suppose you had a matter come up in which you had a strong opinion, and yet the clear meaning of a statute or a constitutional provision is the other way. How would you rule on that?

Mr. BEEZER. Mr. Chairman, I will take an oath that affirms that I will support and defend the constitution of the United States, and there is really no choice given to me but to follow the constitutional principles.

The CHAIRMAN. On the other hand, I might ask you this question, now.

Suppose the courts had handed down decisions one way, but you are absolutely convinced that the interpretation was wrong, that it should be construed another way. How would you rule then?

Mr. BEEZER. If my convictions were bottomed in constitutional principles, I certainly would follow that in terms of a dissent if that were required. I believe that appellate courts should attempt to resolve their differences and to speak with a single voice, but if a constitutional principle were involved, I would have no difficulty in being the lone dissent or the voice in the wilderness, if you will.

The CHAIRMAN. Down through the years, courts have reversed themselves because they reach different conclusions, and I am glad to hear you take that position.

Mr. Beezer, a recent annual report of the Executive Administrative Officers of the U.S Courts indicated that the workload of the 12 U.S. Courts of Appeal continues to rise. Approximately 28,000 new appeals were filed in 1982. This represents a 50-percent increase over the previous record of 1981, and a 68-percent increase above the number of appeals filed for 1975, and 1982 was also the first year that filings exceeded the level of 600 per panel.

Do you have any recommendation as to how the number of cases on appeal can be reduced?

Mr. BEEZER. Mr. Chairman, the jurisdiction of the Court of Appeals is fixed by Federal statute, and if the wisdom of Congress is to deny appeals from administrative proceedings and other matters that have been built into the statutes, that is going to cut back on the number of cases filed.

I don't see any way to say to a party or his attorney, "As long as you are within the jurisdictional requirements of the Court of Appeals, you can't file." I know the court is dismissing some cases on technical grounds. I know that the court is limiting oral argument in some cases, but the basic filings are going to continue to rise.

I know in the ninth circuit, we have over 150,000 attorneys, I believe, in all the States and territories involved. There is a tremendous market out there for litigation, and the attorneys are going to keep filing, and the courts are going to hear those appeals as long as the jurisdictional requirements remain as they are.

The CHAIRMAN. I think those are all the questions we have.

Mr. BEEZER. May I express my thanks to you, Mr. Chairman, for conducting these hearings so promptly following the appointment—nomination—of March 1.

The CHAIRMAN. We hope we get you on the agenda for next Thursday, and we hope you have a nice service on the bench.

Mr. BEEZER. Thank you, sir.

The CHAIRMAN. We ask Mr. Holland, now, to come around.

Without objection, Mr. Holland, we will place your résumé in the record.

I believe you were born in Michigan, attended the University of Michigan, and law school there, too.

TESTIMONY OF H. RUSSEL HOLLAND, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ALASKA

Mr. HOLLAND. Yes, sir, that's correct.

The CHAIRMAN. Mr. Holland, as I understand, you were a law partner of Senator Stevens?

Mr. HOLLAND. Yes, sir, I was, some 15 years ago.

The CHAIRMAN. How many members did you have in your firm?

Mr. HOLLAND. At the last, Senator, there were just the two of us. Prior to that, we were a part of a somewhat firm, perhaps five, six members.

The CHAIRMAN. Do you have any members of your family here you want to introduce?

Mr. HOLLAND. Thank you, Senator. I do not. I am here alone today.

The CHAIRMAN. You are a long way from Alaska to bring people.

Mr. HOLLAND. I am, sir.

The CHAIRMAN. Now, you have been a practicing attorney, I believe, since 1965. Is that right?

Mr. HOLLAND. Yes, that's correct.

The CHAIRMAN. You have been nominated for the position of U.S. district judge for the District of Alaska. Now, what do you feel will be the most rewarding aspect of serving in this capacity?

Mr. HOLLAND. Mr. Chairman, I think one of the most rewarding aspects of this job, for me, would be to get out of the role of being an advocate. While I have enjoyed that, I sometimes find it frustrating in that I tend to form conclusions about how things ought to be done, and I would like to see them effected, and I think serving in the capacity of a judge, where I can resolve disputes, rather than participate in them, would probably be the most rewarding aspect of the job.

The CHAIRMAN. Some judges, Federal judges especially, have taken to themselves, it seems, an arrogance of power, and they have attempted to take over school districts, and they have attempted to inject themselves into matters that are under State institutions, and issue rules and regulations, and they are really going beyond their scope of authority.

Now, we not only have the separation of powers of the three branches, but you have a division of powers. The Federal Government has only those powers under the Constitution which have been specifically delegated to it in the Constitution. The States have all other powers. I assume you agree with that?

Mr. HOLLAND. Yes, sir.

The CHAIRMAN. Now, will it be your intention as a judge to leave to the local States the running of their own institutions and confine your jurisdiction as provided in the Constitution?

Mr. HOLLAND. Very definitely, Mr. Chairman. The Constitution and the Federal laws on occasion come in conflict with State matters, and when that happens, those disagreements, those conflicts, must be resolved, but otherwise, the States ought to be limited, and left, to doing their business without interference from the Federal courts.

The CHAIRMAN. Has your practice been mostly criminal, or civil, or a combination?

Mr. HOLLAND. My practice has been almost exclusively civil, Senator.

The CHAIRMAN. Do you think you will have any difficulty in criminal cases?

Mr. HOLLAND. No, I don't. Quite fortuitously, there is the Judiciary Center School coming up next week, and I plan to take off from my practice some 6 weeks before I would be sworn in to bone up on a number of things.

The CHAIRMAN. That would be very helpful. Of course, young lawyers generally start out in the criminal field and kind of make a reputation and get before the public. They end up, generally, in the civil field, where they make more money. And so, evidently, you have arrived at that state already.

Mr. HOLLAND. Yes, sir, that is essentially what happened to me.

The CHAIRMAN. We wish you a successful tenure on the bench, and your nomination will be on the agenda for next Thursday.

Mr. HOLLAND. Thank you very much, Mr. Chairman. I would like to thank the Senators for the support that I received from them, and I thank you very much.

The CHAIRMAN. You are now excused.

Our next candidate is Mr. Prado, Judge Prado. Will you come around, Judge?

Judge Prado, you have previously served, I believe, as a State district judge for Bexar County. Is that right?

TESTIMONY OF EDWARD C. PRADO, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TEXAS

Mr. PRADO. Yes, Mr. Chairman, that is correct.

The CHAIRMAN. How is that pronounced?

Mr. PRADO. "Bayer."

The CHAIRMAN. And how do you spell it?

Mr. **Prado**. The "x" is silent in the spelling, B-e-x-a-r. It is an Indian term and, like Mexico, the "x" is pronounced like a "j." Really, it should be "Bayhar," but Texans, now, we pronounce it "Bayer," just make the "x" silent.

The **Chairman**. It is spelled "Bexar," but pronounced "Bayer"?

Mr. **Prado**. That is correct.

The **Chairman**. I am glad to learn some Texas pronunciations.

Now, I believe at present you are U.S. attorney for the Western District of Texas.

Mr. **Prado**. Yes, sir.

The **Chairman**. How long have you been district attorney there?

Mr. **Prado**. A little over 3 years.

The **Chairman**. Have you enjoyed your work there?

Mr. **Prado**. Yes; it has been very challenging, very exciting, representing the United States in court, whether it be a criminal case, or representing Mr. Watt, or Mr. Block.

The **Chairman**. Have you actually tried cases there as district attorney, or have you left it to your assistants, mostly?

Mr. **Prado**. Our office has 29 assistants, and sometimes it is quite a bit of a headache to try to be the administrator of that office, but I have managed to get into court and be involved in some of the more significant criminal trials that we have had in our district.

The **Chairman**. I guess you have overseen cases that were tried, though, whether you tried them yourself or not. You more or less supervised them, I presume, as district attorney.

Mr. **Prado**. Yes, sir, most definitely. We have all types of cases, and we are so spread out that I do get around the district and see what the assistants are doing.

The **Chairman**. I presume you feel this experience has been helpful to you, and will be helpful when you become a Federal judge.

Mr. **Prado**. Oh, most definitely. I have either been involved in, or supervised, almost every type of Federal case that is imaginable that can come before the court, and it, and it has given me quite a deal of experience and has prepared me well, I think, for a State judgeship—for a Federal judgeship.

The **Chairman**. We have recommended in this crime package we passed, and also in a separate bill on sentencing that a crime commission be set up, a sentencing commission be set up. Some judges might give 2 years for a crime, and another one 30 years. We feel that some go too far either way, and so this commission is going to recommend some standards or guidelines. Do you think that would be helpful?

Mr. **Prado**. Yes, sir; I have seen it firsthand, first as a Federal public defender and now, more recently, as U.S. attorney. I have seen inconsistencies in very similar cases. I have seen an individual go into one court and get a slap on the wrist, and almost the same fact situation in another court, where someone gets a lot more severe sentence, and it was just a matter of the luck of the draw as to what judge they were before, and in discussing this with my colleagues from around the country, other U.S. attorneys, I see the inconsistencies in the different regions of our country.

There has to be some consistency in order to have a fair system of sentencing throughout the country.

The CHAIRMAN. You heard the other question I asked a few moments ago about judicial activism by Federal judges taking over authorities that really belong to the States, trying to run school districts and State institutions and so forth.

How would you feel about that?

Mr. PRADO. I think that the role of a judge is to preside and decide over the controversy that is before him, and to try to restrict his decisionmaking as much as possible to that controversy or that case that is before him, and if at all possible try to avoid making overextensive decisions that have overall impacts throughout the country, or throughout an area. He should try to be as restrictive to the controversy that is before him as possible.

The CHAIRMAN. Under the division of powers, the Federal jurisdiction extends in certain directions, and then it stops. The States have authority, too. I am a strong believer in preserving the rights of the States. As long as we have 50 strong States, I don't think you will ever have a dictator to arise in this country. But if the Federal Government centralizes more and more power in Washington and deprives the States of their authority and their rights, they become nothing more than territories. I am in favor of keeping strong States, and I think we should preserve that distinction between the authority of the Federal Government and the authority of the States. How do you feel about that?

Mr. PRADO. I agree with you, Senator. Having been in the Federal system as an attorney exclusively for some time, I have come across some abuses of the powers that Federal judges have, and I certainly have a lot more respect for a judge, a Federal judge, because of that, and it has made me aware of some of the abuses that can happen when a Federal judge overextends his authority and attempts to get involved in administrative matters which should be left to local government.

The CHAIRMAN. Without objection, we will place your résumé in the record.

Do you have anything else you want to say?

Mr. PRADO. Yes, sir, if I could introduce my family, who are up here with me.

The CHAIRMAN. We would be glad to have you to introduce your family, and any friends you have here with you at this time.

Mr. PRADO. Present with me today is my mother, Mrs. Bertha Prado, my wife, Maria, and our son, Edward, who is in the first grade, and is on spring break and was lucky enough to be able to come up here with us.

The CHAIRMAN. We are glad to have all of you with us on this occasion.

We hope you enjoy your service on the bench, and we will have your nomination before the committee next Thursday, on the agenda at that time. I hope we can get it expedited.

I hope you enjoy your service on the bench.

Mr. PRADO. Thank you.

The CHAIRMAN. That completes the hearing. We now stand adjourned.

[Whereupon, at 10:46 a.m., the committee was recessed, to reconvene subject to the call of the Chair.]

BIOGRAPHIES

ROBERT R. BEEZER

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: July 21, 1928, Seattle, WA.

Legal residence: Washington.

Marital status: Married to Hazlehurst Plant Smith Breezer, 3 children.

Education: 1946-48—University of Washington; 1950-51—University of Virginia, B.A. degree; 1953-56—University of Virginia, Law School, LL.B. degree.

Bar: 1956—Washington.

Experience: 1956 to present—Schweppe, Krug, Tausend & Beezer (firm has had several different names).

H. RUSSEL HOLLAND

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ALASKA

Birth: September 18, 1936, Pontiac MI.

Legal residence: Alaska.

Marital status: Married to Hazlehurst Plant Smith Beezer, 3 children.

Education: 1954-58—University of Michigan, B.A. degree; 1958-1961—University of Michigan Law School, LL.B. degree.

Bar: 1963—Alaska.

Experience: 1961-1963—Law Clerk, Chief Justice Nebit, Alaska Supreme Court; 1963-1965—Assistant U.S. attorney, District of Alaska; 1965-1966—Stevens & Savage, associate; 1966—Stevens, Savage, Holland, Reasor & Erwin, partner; 1967—Stevens, Savage, Holland, Erwin & Edwards, partner; 1967-68—Stevens & Holland, partner; 1968-1970—Private practice; 1970-1978—Holland & Thornton, partner; 1978—Holland, Thornton & Trefry, partner; 1978 to present—Holland & Trefry, partner.

EDWARD C. PRADO

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TEXAS

Birth: June 7, 1947, San Antonio, TX.

Legal residence: Texas.

Marital status: Married to Maria Anita Jung Prado, 1 child.

Education: 1965-67—San Antonio Junior College, A.A. degree; 1967-69—University of Texas, B.A. degree; 1969-72—University of Texas School of Law, J.D. degree.

Bar: 1972—Texas.

Military service: 1972-1980—U.S. Army Reserve.

Experience: 1972-1976—Assistant district attorney, Bexar County; 1976-1980—Assistant Federal Public Defender, Western District of Texas; 1980—State district judge, 187th Judicial District, Bexar County; 1981 to present—U.S. attorney, Western District of Texas.

CONFIRMATION HEARING ON:

JOSEPH J. LONGOBARDI, EDWARD LEAVY, TERRENCE W. BOYLE, AND WILLIAM D. BROWNING

WEDNESDAY, APRIL 11, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Biden.

Staff present: Vinton DeVane Lide, chief counsel and staff director; Deborah K. Owen, general counsel; Mark H. Gitenstein, minority chief counsel; and Deborah G. Bernstein, chief clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. We meet this afternoon to hold confirmation hearings on judges. The first one—I believe the Senator from Delaware is here—Joseph J. Longobardi.

Is that the way you pronounce it?

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator Roth. Thank you very much. I want to express my personal appreciation to you for scheduling this confirmation hearing so promptly.

Let me say at the outset that I very strongly support Vice Chancellor Longobardi for this most important position. I say that because he brings to the Federal district court a remarkable background of experience and knowledge, having served on two State courts, having worked in the attorney general's office, and having been in the private practice of law for 17 years.

In his distinguished career, Chancellor Longobardi served as deputy attorney general of Delaware and on the Delaware Superior Court. He held this position from 1974 to 1982. And Governor Du Pont named him to the court of chancery. On both occasions, he was unanimously approved by the Delaware State Senate.

I might add, Mr. Chairman, while serving on the superior court, Chancellor Longobardi served as the chairman of the judicial conference committee, which successfully resolved the constitutional confrontation between the judicial and legislative branches of the State government.

In 1981, he received a national award in recognition for a paper on court administration and caseload management. He put his theories into practice while serving on the superior court. And a new caseload management system, which he designed and implemented for the court, has won the attention and praise of many other State courts.

So, Mr. Chairman, Judge Longobardi will be a welcome addition to the Federal branch, and I am proud to have recommended his nomination. I hope the committee will give him expeditious and favorable consideration.

The **Chairman**. Thank you very much, Senator.

We are very pleased to have you here. Feel free to stay, or if you have to leave, we will understand.

And we will come back to him after awhile. I want to hear all the Senators first. I know how busy they are.

And Senator Biden——

Senator **Roth**. I want to express my appreciation to Senator Biden for his role.

The **Chairman**. Thank you.

Next is Edward Leavy of Oregon. Senators Hatfield and Packwood come up.

Senator Hatfield, the senior Senator, I guess you can proceed.

STATEMENTS OF HON. MARK O. HATFIELD, A UNITED STATES SENATOR FROM THE STATE OF OREGON

Senator **Hatfield**. Thank you, Mr. Chairman and members of the committee.

Mr. Chairman, Senator Packwood and I have the high privilege of presenting to you and to this committee for consideration as an appointee to the Federal district court in Portland a very outstanding gentleman by the name of Edward Leavy, who has had some 30 years of experience in the practice and administration of law. He was a graduate of the University of Portland cum laude. Then he took his law degree at the University of Notre Dame, cum laude, and then began his practice in Oregon.

Then he served 3 years as the district attorney of Lane County, OR. He served 4 years as a district judge of Lane County, OR. He served 15 years as a circuit court judge in the State of Oregon. He served as a temporary appointee to the Oregon Supreme Court. And then since 1976, for almost an 8-year period he has served as the U.S. magistrate for the U.S. Government.

Mr. Chairman, there really is not much more that can be said of this very outstanding man. He has been given by the Bar Association of Oregon its highest ranking for a number of judicial appointments over his life. And he has been a very active citizen in the community.

He is married, has four children, and is an outstanding man that we are proud to present to you at this time.

I would like to defer to my colleague, Senator Packwood, for any additional remarks. But we are both most happy to be here today to present Ed Leavy.

The CHAIRMAN. Thank you very much, Senator.

We are very pleased to have you, Senator Packwood.

STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. Mr. Chairman, members of the committee, I thank you very much.

Let me echo what my senior colleague, Senator Hatfield, has said and add just a bit to it.

Not only are we getting a man for a trial court position that has had extraordinary trial court experience, 15 years as a circuit court judge in Oregon and then 8 years as a magistrate for the Federal court in which he has tried many cases, but I have heard over and over and over from trial lawyer upon trial lawyer in the State of Oregon that Ed Leavy is the best judge in the State of Oregon. Trial lawyers have said this without derogation to any of the other Federal court judges, but just that Ed Leavy is an extraordinary judge.

Ed Leavy was recommended the time before last when a Federal district court judge was picked by a bar selection committee by Senator Hatfield. He was one of the five recommended by the bar selection committee and the one that was picked by the administration.

A majority of the American Bar Association committee has recommended him as exceptionally qualified. I think that Senator Hatfield and I can both say that it is unique and almost unusual opportunity to present a man who is already so extraordinarily highly thought of by the practitioners who will be appearing before him or who have previously appeared before him.

The CHAIRMAN. Senator, we are glad to have you with us. And I might say that you stand very highly endorsed, Judge Leavy, by Senator Hatfield and Senator Packwood. I do not know whether there is any other State that has two chairmen or not, but Senator Hatfield, of course, is chairman of the Appropriations Committee, and Senator Packwood of the Commerce Committee. And both are fine men, and you are fortunate to have both of them on your side.

I know they are busy and they are excused if they wish to go. Or they can stay if they wish.

Mr. LEAVY. I just want to say thanks to both of them.

The CHAIRMAN. We will take the rest of the Senators.

Senator Biden has arrived in the meantime. He is an active member of this committee, a very distinguished member. He has a judge here, Longobardi, from Delaware.

And, Senator, would you want to speak to that?

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Mr. Chairman, let me begin by explaining why I was not here at the outset. The Budget Committee is meeting right now and an amendment by Senator Kassebaum and myself had been introduced at 2 o'clock, so I made an opening statement and came right down.

I would ask unanimous consent that the statement I prepared on behalf of my support of Judge Longobardi be placed in the record as if read at this time.

And let me amplify it on only two points. We are a small State, Delaware, the State of Delaware. We have a very proud, proud tradition of judicial excellence. I think it is fair to say that the American Bar Association shares that view. And our State courts have been the models for many State courts across the country.

Vice Chancellor Longobardi has been a force in the Delaware legal community for over 25 years, and in the last 10 years has been one of the more preeminent men in the legal profession in the State of Delaware. Without going into my whole statement, in the interest of time, I would like to emphasize how strongly I support Mr. Longobardi's nomination. And I must say very bluntly were I in the position of having had to make the choice Senator Roth had to make, I just as well would have made the same exact choice. I think he is a first-rate man and scholar and has the judicial temperament required for such an important job.

I will not take any more of the committee's time at this moment. I would like to welcome his son, Joe, who, I might add, is a graduate of my high school. We both went to the same Catholic prep school. And Mrs. Longobardi as well. I welcome them both and look forward to the expeditious confirmation of this nomination in the committee and on the floor.

[Material submitted for the record follows:]

Prepared Statement of Senator Joseph R. Biden, Jr.

Mr. Chairman, vice chancellor Joseph Longobardi has been a credit to the legal profession of the State of Delaware for more than 25 years and has been one of my State's preeminent legal figures for well over a decade. I very strongly support his nomination to the United States District Court for the District of Delaware. I also would like to congratulate my good friend and colleague, Senator Roth, for making such an excellent choice.

Vice Chancellor Longobardi's biography and Judiciary Committee questionnaire will be included in the record but I would like to take a moment to point out some of his more notable accomplishments.

Vice Chancellor Longobardi has successfully engaged in a wide array of endeavors in the legal profession. After graduating from the Temple University School of Law, where he was associate editor of the Temple Law Review and received the S.A. Shull Award for excellence in legal research and writing. He returned to his native State of Delarware to begin his legal career as a self-employed practitioner in Wilmington. From 1959–1961 he served as deputy attorney general of Delaware, and then returned to private practice.

In 1974 Vice Chancellor Longobardi left the private practice of law when he was appointed to the Superior Court of Delaware by Governor Sherman Tribbett. He held that position until 1982 when he was named by Governor Pete DuPont to be Vice Chancellor of the Court of Chancery, which is the Court of Equity in Delaware and is held in very high esteem for the quality of its work.

It is clearly evident, then, that Vice Chancellor Longobardi has a diverse and highly accomplished legal background, and is well qualified to be a District Court Judge.

I would like to take note of one particularly outstanding accomplishment that I think is indicative of the quality of judge we are getting. In 1981, while serving on the Superior Court, he wrote a manuscript concerning the Superior Court's criminal caseflow management program entitled "A study in caseflow management." He received an award from the National Center for State Courts for that manuscript, a condensed copy of which was published by the National Center for State Courts in its State Court Journal in 1982.

Even more important than what this tells us about the high quality of the vice chancellor's scholarship, however, is what it tells us about his ability as a trial judge. The caseflow management program, for which the vice chancellor was largely responsible, had a very significant impact on the effective and efficient administration of justice in the Delaware judicial system. For example, prior to implementation of the program, criminal felony cases in Delaware took an average of between 15 and 24 months from arrest to disposition. But at the high point of the program that time period had been reduced to 62 days. That, needless to say, is an extraordinary accomplishment and is a reflection of the efficient and intelligent way in which the vice chancellor manages his courtroom.

Mr. Chairman, I believe there is no question that Vice Chancellor Joseph Longobardi will be a Federal District Judge of the highest caliber. I strongly endorse his nomination.

The CHAIRMAN. I just want to say to you, Mr. Longobardi, that although these Senators are in different parties, they both speak highly of you. One of them recommended you and the other endorses you. We are very pleased.

Mr. LONGOBARDI. I thank both of them.

The CHAIRMAN. We will now pass on to the next Senator. I think Senator Helms is here from North Carolina. He has Mr. Boyle. If he and Mr. Boyle would come around.

Is Senator East going to appear?

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. He will be here shortly.

Mr. Chairman, sometimes we come to present nominees as a matter of perfunctory privilege. But this time I come enthusiastically and gratefully to this young man for being able to offer his services.

Terry Boyle—Terrence William Boyle, whom the President of the United States has nominated to serve as U.S. district judge for the Eastern District of North Carolina, is a remarkable, remarkable young man. He is highly respected. He is a competent attorney in a law firm which happens to be one of the most prestigious law firms in eastern North Carolina. His practice has taken him regularly before both State and Federal courts.

He is held in high esteem by members of the bar. So many of them have contacted me since I proposed Mr. Boyle's name to the President. And a little later on, I am going to ask the Chair if some of the communications can be made a part of the record because I think it is significant that so many people took it upon themselves to pay their respects to this young man.

Now, Terry Boyle served as secretary-treasurer of the first judicial district bar in 1982–83. He is currently serving as vice president of the district bar. He is a member of the American and North Carolina Bar Associations, North Carolina Bar, and the District of Columbia Bar Association. He is also a member of the family law section of the North Carolina Bar Association, and he has been a lecturer in the continuing legal education program for the Wake Forest University School of Law.

Now, Mr. Chairman, I hope the Chair will indulge me by making my full statement a part of the record and I will just summarize the balance of it.

The CHAIRMAN. Without objection, the entire statement will be in the record.

Senator HELMS. I thank the chairman.

Now, let me stress the point that Terry Boyle enjoys strong support across North Carolina. I have carefully checked with scores of leading attorneys, both Democrats and Republicans. And without exception, they have been most enthusiastic about Mr. Boyle's nomination.

For example, the Honorable John V. Hunter III, of Raleigh, who has served for many years in the House of Delegates of the American Bar Association, has given his unqualified endorsement to Mr. Boyle. And let me mention a very fine gentleman, perhaps one of the most respected and distinguished attorneys in North Carolina, Mr. Gerald F. White. He served on the State bar council many years, and he wrote to me as follows, and this is one quote out of the letter. He said,

> I know the attorneys in my district, and I also know that your recommendation of Terry Boyle to serve on the Federal bench would meet with the enthusiastic approval of the members of our First District Bar. We need a Federal Judge from northeastern North Carolina, and this would make a good balance of judicial residency without our Eastern District. Please select this most qualified attorney to this appointment.

Mr. Chairman, I would further ask your indulgence. I have here a sample of the communications I received. And if it would not be an imposition, I would like for those to be made a part of the record as well as my statement.

The CHAIRMAN. Without objection, they will be.

Senator HELMS. I thank the Chair.

[Material received for the record follows:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

Mr. Chairman, it is an honor and a privilege to be with you and the other distinguished members of this committee this afternoon to introduce to you Mr. Terrance William Boyle, whom the President of the United States has nominated to serve as United States District Judge for the Eastern District of North Carolina.

Terry Boyle is a highly respected and competent attorney in the law firm LeRoy, Wells, Shaw, Hornthal and Riley—one of the most prestigious law firms in eastern North Carolina. His practice has taken him regularly before both State and Federal Courts. He is held in high esteem by prominent members of the bar, many of whom have gone to the trouble of voicing their support for his nomination.

Terry Boyle served as Secretary-Treasurer of the First Judicial District Bar in 1982-1983. He is currently serving as Vice President of the District Bar. He is a member of the American and North Carolina Bar Associations, the North Carolina State Bar, and the District of Columbia Bar Association. He is admitted to practice in the Eastern District of North Carolina and the Fourth Circuit Court of Appeals. He is also a member of the Council of the Family Law Section of the North Carolina Bar Association. He has been a Lecturer in the Continuing Legal Education Program at the Wake Forest University School of Law.

I have first-hand knowledge of Terry Boyle's competence, dedication and character. He served as legislative assistant on my Senate staff in 1973. I was the beneficiary of his exceptional legal skills and, most importantly, his high moral character and uncompromising integrity. Before joining my staff, he served with distinction as Minority Counsel to the Committee on Banking, Finance and Urban Affairs in the U.S. House of Representatives. He worked his way through the American University Law School, graduating in 1970.

Terry Boyle is actively involved in the religious, civic, and community life of northeastern North Carolina. He and his family are members of St. Ann's Catholic Church in Edenton. He is a member of the Elizabeth City Rotary Club. From 1974-1977, he served on the Edenton Historical Commission.

Terry Boyle resides in northeastern North Carolina, an area of my state that cannot now claim a sitting federal district judge. The other federal judges in North Carolina reside in Raleigh and the southeastern section of our state.

As a consequence, few terms of court are held in the Elizabeth City Division. I am confident that Terry Boyle's appointment would be appreciated by the lawyers and citizens of this part of the state. It has been quite a while since a U.S. District Judge came from the Elizabeth City Division.

Mr. Chairman, Terry Boyle wholeheartedly shares your deeply held views, and those of President Reagan, on the proper role of the Federal Judiciary in our system of government. He is committed to the cause of freedom and personal dignity and justice for all Americans as guaranteed by our Constitution.

In conclusion, Mr. Chairman, I would stress that Terry Boyle enjoys strong support in North Carolina. I have carefully checked with scores of leading attorneys, both Democrats and Republicans, without exception they have been most enthusiastic about this nomination. For example, the Honorable John V. Hunter, III, of Raleigh, who served for many years as a member of the House of Delegates of the American Bar Association, has given his unqualified endorsement to Terry Boyle.

Similar endorsements have come from a former Speaker of the N.C. House of Representatives, and many others. All have paid tribute to Mr. Boyle's competence, training, experience and integrity.

The Honorable Gerald F. White of Elizabeth City, who has served on the State Bar Council for many years, wrote as follows: "I know the attorneys in my District, and I also know that your recommendation of Terry Boyle to serve (on the federal bench) would meet with the enthusiastic approval of the members of our First District Bar. . . We need a federal judge from northeastern North Carolina. This would make a good balance of judicial residency with our Eastern District. Please select this most qualified attorney for this appointment."

I have here a number of letters and telegrams from citizens in North Carolina who support Terry Boyle's confirmation, and I ask that they be made part of the Record.

Thank you, Mr. Chairman, for the privilege of introducing Terry Boyle to this committee.

Elizabeth City, NC, December 29, 1983.

Senator Jesse Helms
Century Post Office Bldg., Raleigh, NC.

Dear Senator Helms: I strongly recommend that you nominate Terrence W. Boyle to the vacant district judgeship of the Eastern District of North Carolina.

Sincerely,

O.C. Abbott.

I heartily endorse Terrence W. Boyle for the Eastern District of North Carolina Federal judgeship vacancy. I firmly believe that he will be an excellent Federal judge.

C. Glen Austin,
Attorney at Law, Elizabeth City, NC.

Senator Jesse Helms,
Century P.O. Bldg 602; Raleigh, NC.

Dear Senator Helms: I strongly recommend that Terrence W. Boyle be appointed Federal judge for the Eastern District.

Sincerely,

C. Christopher Bean,
Attorney at Law, Edenton, NC.

Senator Jesse Helms,
Century Post Office Bldg., Raleigh, NC.

This is a confirmation copy of a telegram addressed to you:

We Highly recommend the appointment of Terrence W. Boyle to the bench of the U.S. District Court of the Eastern District of North Carolina.

Walter G. Edwards,
Walter G. Edwards, Jr.,
Attorneys at Law.

Senator **Jesse Helms**,
Century Post Office Bldg., Raleigh, NC.

We highly recommend the appointment of Terrence W. Boyle to the bench of the U.S. District Court of the Eastern District of North Carolina.

Walter G. Edwards,
Walter G. Edwards, Jr.,
Attorneys at Law.

Senator **Jesse Helms**,
Century P.O. Bldg., Raleigh, NC.

I recommend and urge you to nominate Terrence W. Boyle as Federal Judge.

E. Ray Etheridge.

Senator **Jesse Helms**,
Century P.O. Bldg., Raleigh, NC.

Dear Senator Helms: This is to avise that we wholeheartedly endorse and support the appointment of Terrence W. Boyle as United States Federal District Judge for Eastern North Carolina.

Godwin & Godwin,
Attorneys, Gates, NC.

Senator **Jesse Helms**,
Century Post Office Bldg. 602, Raleigh, NC.

Have learned of eastern district federal judgeship vacancy and respectfully recommend and respectfully suggest attorney Terrence W. Boyle of Elizabeth City, North Carolina, top flight in every respect.

John H. Hall, Jr.,
Attorney at law, Elizabeth City, NC.

Jesse Helms,
Century Post Office Bldg. 602, Raleigh, NC.

Dear Senator Helms: As a member of and past president of first judicial district bar I heartily recommend Terrence Boyle for appointment to the Federal judiciary.

Sincerely,

Wallace H. McCown,
Attorney at law, Manteo, NC.

Senator **Jesse Helms**,
Century Post Office Bldg. 602, Raliegh, NC.

I highly recommend Terrence W. Boyle for the U.S. District Court judgeship for the Eastern District of North Carolina. Terry is the vice president of the first district bar of North Carolina and is well liked and highly respected.

John V. Matthews, Jr.,
Hertford, NC.

Please accept my earnest recommendation for Terrence W. Boyle to appointment as Federal District Judge for the Eastern District of North Carolina.

John S. Morrison,
Former U.S. Magistrate, Eastern District of North Carolina, Elizabeth City, NC.

Senator **Jesse Helms**,
Century P.O. Bldg 602, Raleigh, NC.

Dear Senator: I heartily recommend and endorse Terrence W. Boyle of Elizabeth City for the Federal judgeship in the Eastern District. He is a man of the highest integrity and has the highest qualifications for the position of anyone I know.

Sincerely,

David W. Boone,
Attorney, Elizabeth City, NC.

Senator **Jesse Helms**,
Century Post Office Bldg. 602, Raleigh, NC.

Dear Senator Helms: We strongly and fully support the nomination of Terrence W. Boyle of Elizabeth City for appointment as a U.S. St Court Judge for the Eastern District of North Carolina.

Sincerely,

Kellogg, White, Evans, Sharp & Michael,
Attorneys at Law, Manteo, NC.

Senator **Jesse Helms**,
Century P.O. Bldg. 602, Raleigh, NC.

Dear Senator: I heartily recommend and endorse Terrence W. Boyle of Elizabeth City for the Federal judgeship in the Eastern District of North Carolina.

Sincerely,

G. Elvin Small III,
Attorney, Elizabeth City, NC.

Senator **Jesse Helms**,
Century P.O. Bldg. 602, Raleigh, NC.

Dear Senator: I heartily recommend and endorse Terrence W. Boyle of Elizabeth City for the Federal judgeship in the Eastern District of North Carolina.

Sincerely,

Max S. and Charles T. Busby,
Attorneys, Edenton, NC.

White, Hall, Mullen, Brumsey & Small,
Attorneys at Law,
Elizabeth City, NC, December 29, 1983.

Senator **Jesse Helms**,
Century Post Office Building, Raleigh, NC.

Dear Senator Helms: I have practiced law in the first judicial district of North Carolina for almost thirty years, and I consider this to be one of the most important letters that I have ever written.

I understand that a United States District Judgeship vacancy exists in the Eastern District of North Carolina in that Judge Dupree is now on senior status.

Senator, I strongly urge that you recommend to the President that he nominate Terrence W. Boyle of Elizabeth City to fill this highly important position. Terry Boyle is eminently qualified by character, by training, and by experience to serve as a United States District Court Judge. He is a gentleman of the first order; he has a wide knowledge of the law; and he has a broad range of experience as a practitioner of law, particularly including active trial work. Such an appointment of this attorney to this judicial position would be superb. There is no other word for it.

I have served on the State Bar Council from the first district for a number of years. I know the attorneys in my district, and I also know that your recommendation of Terry Boyle to serve in this position would meet with the enthusiastic approval of the members of our first district bar. I am convinced that your favorable action in the foregoing respect would also be applauded by the bench and bar and general public statewide.

We need a Federal judge from northeastern North Carolina. This would make a good balance of judicial residency within our eastern district. Please select this most qualified attorney for this appointment.

Because of Terry Boyle's superior qualifications as an attorney, some time ago I recommended him for an "A" rating in Martindale-Hubbell Law Directory, and I expect that he will be so rated this year.

Senator Helms, in summary, I say that if you set in motion the action that will bring Terry Boyle to the Federal Bench, his distinguished service as a United States District Judge will make you proud that you had an important part in it.

Thank you for considering this communication.

With kind wishes, I am

Sincerely,

Gerald F. White.

U.S. Senate,
Washington, DC, January 19, 1984.

Mr. Gerald F. White,
Attorney at Law,
White, Mullen, Brumsey & Small,
Elizabeth City, NC.

Dear Gerald: It goes without saying that I genuinely appreciate your comments about my recommendation of Terry Boyle. Terry is indeed a fine and competent young man, and I hope he will be nominated and confirmed—and that he will serve with distinction for 30 or more years.

I am dedicated to doing whatever I can to assure a strong judicial system in our country. I intend to continue to do all I can to encourage our judges to be attentive to the greatest Constitution ever devised by the minds of patriots.

I was not surprised that the news media sought to emphasize Terry's family ties. But I can assure you that I selected Terry because I am personally aware of his ability, character and dedication. That is why I so genuinely appreciate hearing from you.

With kind regards.

Sincerely,

Jesse Helms.

Hunter, Wharton & Howell,
Attorneys at Law,
Raleigh, NC, December 30, 1983.

Hon. Jesse Helms,
U.S. Senator, Raleigh, NC.

Dear Senator Helms: I was immensely pleased to hear that you are considering the nomination of Terrence W. Boyle of Elizabeth City to the federal judgeship in the Eastern District of North Carolina.

Over about the past two years, I have worked very closely with Mr. Boyle in a matter in which we represent the same party. We prepared the case together, tried it together, and it is presently on appeal. I have found Mr. Boyle to be a lawyer of outstanding integrity, ability and energy. I was so impressed with his performance in the matter we have handled together that, after the trial, I wrote a letter to his senior partner praising his performance as a lawyer; this is something which I have seldom done during the 24 years that I have been in private practice in North Carolina.

I would expect Mr. Boyle to perform with distinction on the federal bench and to bring honor to North Carolina. I am ready to state my unqualified endorsement of him to any person or committee having a role in processing the nomination.

Very truly yours,

John V. Hunter III.

Trimpi, Thompson & Nash,
Attorneys at Law,
Elizabeth City, NC, January 10, 1984.

Re Terrence W. Boyle.

Hon. Jesse Helms,
U.S. Senate, Washington, DC.

Dear Senator Helms: When I read about your nominating Terry Boyle for federal judgeship in this area, I was elated. We had given up any hope of having a judge from this area, and to see a peer like Terry nominated is certainly encouraging.

I have known Terry for a number of years, mostly from opposite sides of cases. Intelligent, hardworking, diligent, cautious, self-deprecatory and honest, balanced with humor and dry wit. I can not think of many people before whom I would rather try a case. He could take a federal judgeship in stride, notwithstanding the dizzying aspect of the position. I'm sure that it would not go to his head; I can't imagine Terry developing arrogance or self-righteousness. With his integrity, abusing his position would absolutely be out of the question. Terry, in my opinion, has that rare commodity called judicial temperament.

In writing this letter I'm speaking for Everett Thompson and Tom Nash, my law partners, who have also signed this letter. I think Everett especially will miss Terry if he becomes a judge because of the rapport they have had over the years, yet he is 100% behind your choice. We talked about it last week and realized how astute and logical choosing Terry was, not only for his capability, but for the geographics. A natural triangle of judges from Wilmington, Raleigh and Elizabeth City would give the public and lawyers much greater access. The importance of such access will become more pronounced with the development of our area, particularly on the coast.

We admire you not only for the wisdom of your choice, but for your courage in making it. Those who will say that the nomination was made for Mr. Ellis's sake will have chosen to ignore Terry's character and capabilities and the clear benefit to the federal judiciary in eastern North Carolina.

You have our firm's complete and unqualified support for your decision, for which you also have our heartfelt thanks.

Sincerely,

By
John G. Trimpi.
C. Everett Thompson.
Thomas P. Nash IV.

The Chairman. Senator East, we would be very pleased to hear from you on Mr. Boyle's nomination.

STATEMENT OF HON. JOHN P. EAST, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator East. Mr. Chairman, I deeply appreciate the opportunity to be here with my distinguished senior colleague from North Carolina to indicate my strong support for an outstanding nominee, Terrence Boyle. Mr. Boyle is the fourth Federal judge that President Reagan has nominated. All three of the previous nominees were confirmed by this committee and by the U.S. Senate. Senator Helms and I both feel very strongly that Mr. Boyle is consistent with the quality and stature of the persons we have presented before this panel, and before the Senate, in the past.

And so it is without reservation that we recommend him to you, Mr. Chairman. I know that these things are matters of record, but let me point out that Mr. Boyle is a graduate of Brown University and the American University, Washington, College of Law. He is a member of the bar in the District of Columbia as well as North Carolina. He has served here on Capitol Hill, the minority counsel on the Subcommittee on Housing of the House Committee on Banking. He has served as a legislative assistant in the U.S. Senate. Mr. Boyle is presently a member of what I would call the most prestigious law firm in eastern North Carolina, located in Elizabeth City.

By the way, eastern North Carolina is my bailiwick, my neck of the woods. I come from Greenville. Mr. Boyle's home is Edenton, which is a fine historic town in eastern North Carolina not far from the law firm's office in Elizabeth City.

I have two quotations that I would like to offer here, Mr. Chairman, for the record, that sum up better than I can Mr. Boyle's qualifications. I am quoting from Mr. D.W. Wells, whom I know very well. He is a former superior court judge and president of the North Carolina Bar Association. He said of Terrence Boyle, and I quote,

> We believe Senator Helms made a wise choice. He is a very capable lawyer and, in my opinion, will be a very fine judge. He has had a wide variety of trial experience and is equipped to handle the trial work.

Another attorney in the area, Gerald F. Whiteman, said that "He is a mature, seasoned attorney." Overall, the reaction of area lawyers is overwhelmingly in favor of Terry Boyle. He is a top-flight attorney who is very active in trial practice in the State and Federal courts.

My conclusion, then, Mr. Chairman, is that Mr. Boyle's legal education is impressive and solid. He has had extensive practice and experience, and is highly respected by the bar of North Carolina. There is ample evidence to document that.

So I hope that this committee will proceed expeditiously to approval of Mr. Boyle and his final confirmation by the U.S. Senate. And again it is my pleasure to join with my senior colleague in this recommendation.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

And I just want to tell Mr. Boyle that he is fortunate to have both of his Senators come in here in person and endorse him. Both of these gentlemen are held in high respect in this body. They are a great influence. And we want to thank them for taking their time and endorsing Mr. Boyle.

The Senators are excused unless you want to remain, whatever you prefer to do.

Senator EAST. I appreciate that, Mr. Chairman.

Senator HELMS. Thank you.

The CHAIRMAN. Our next nominee is Mr. William Browning. I believe he is endorsed by Representatives Udall and McNulty, if you gentlemen will come around.

Now, Senator Goldwater, I understand, and Senator DeConcini both have statements endorsing Mr. Browning. Maybe they will come in. If not, we will put their statements in the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR BARRY GOLDWATER

Mr. Chairman, Members of the Committee: Today, you have before you the nomination of Bill Browning for a judgeship on the U.S. District Court. This nomination is one that I support wholeheartedly and without reservation. Since I have known him, Bill has been a credit to his profession and his community. Without going into the details of his background, I can say that he is as capable and qualified as any person who has ever been chosen for this position. Naturally, I feel a certain pride in Bill because he is a native Arizonan as I am but, as far as I am concerned, this just adds to his qualifications.

As I am sure you are aware, the position of judge of the U.S. District Court is one of the most important parts of our judicial system. With the importance of this position, it is incumbent on all of us to demand the best qualified and most capable people to fill these slots. In one way or another, all of us are affected by the decisions rendered by these Federal judges. Because of that, it is not an easy job to find the right person to safisfy the legal and ethical requirements that are so necessary to the maintenance of a fair and impartial judiciary.

In recommending Bill to President Reagan and endorsing him to this Committee, I think that I can assure the legal community that they will be gaining an extremely capable judge. By virtue of the honors and commendations that have come his way, Bill Browning is certain to act in the highest traditions of our Constitutional system.

In looking back at the process that brought us here today, I am reminded of an anecdote about Benjamin Franklin. Upon emerging from the final session of the Constitutional Convention, Ben Franklin was approached by one of the ladies in the waiting crowd. "What," she asked, "have you given us?" To which Franklin replied, "A republic, madam, if you can keep it." Indeed, that is just what we are doing here today—maintaining the Republic. The nomination and confirmation of Bill Browning will keep alive the heritage that was entrusted to us by Ben Franklin and his compatriots.

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

I regret that I cannot be at the hearing this afternoon to introduce and urge the confirmation of William D. Browning as a United States District Judge for the District of Arizona.

I have known Bill for a long time. I practiced law with him in Tucson, Arizona, and at times I opposed Bill on opposite sides of a legal problem. Always, he was intelligent, industrious, filled with common sense, and fair, cordial, and gentlemanly. In short, he demonstrated all of the qualities that make for a good judge.

Bill graduated from law school in 1960 and has practiced law in Tucson since that time. He served admirably in the United States Air Force and later in the Arizona Air National Guard. He demonstrated leadership in the legal community as president of the Pima County Bar Association in 1967-1968 and was president of the Arizona State Bar in 1972-1973. He has gained experience as a judge and made his contribution to the legal community in Tucson by serving as judge pro tem of the Superior Court of Arizona, serving without compensation in order to reduce the case backlog that existed.

Bill at times demonstrates irreverence and that is a quality that will serve him well as a United States District Judge.

Lifetime appointments to the Federal bench cannot and should not be taken lightly. Occasionally judges with lifetime appointments have tended to forget that they are still human beings with the same weaknesses and probability of error as they had prior to their appointment and confirmation. Bill's occasional irreverence will allow him to reflect back and keep from taking himself too seriously.

I would like to also acknowledge the presence to Zeke Browning, who is most assuredly Bill's better half. The team of Zeke and Bill Browning are one of the outstanding couples in the Tucson community.

In short, although I have disagreed with the President on occasion, in this instance I can only commend him for his excellent appointment of Bill Browning to the United States District Court. I wholeheartedly endorse that appointment and will work toward a speedy confirmation. Bill is a welcome addition to the United States District Court.

The CHAIRMAN. We will be very pleased to hear from you, Congressman Udall, at this time.

STATEMENT OF HON. MORRIS K. UDALL, A U.S. REPRESENTATIVE FROM THE STATE OF ARIZONA

Mr. UDALL. Thank you, Mr. Chairman.

It is with a great deal of pride and satisfaction that I appear here today to urge confirmation of the appointment of William D. Browning of Arizona to the U.S. district court. My acquaintance with Mr. Browning goes back about 25 years when, as a young graduate lawyer, he worked for me as an intern. He was starting his own two-man law firm and rented space from a great old law firm called Udall & Udall on Court Avenue in the city of Tucson.

I followed his career. We have been close friends over the years. I have watched him mature and become one of the most respected and able lawyers in southern Arizona.

He was active in many bar association matters, serving as president of the Pima County Tucson Area Bar Association. He was president of the State of Arizona Bar Association in 1970. He has been very active in all of these matters and has been a leader in reform of the courts and improving of our court system in Arizona.

I think I speak for the entire legal establishment in saying there has never been a better qualified candidate for U.S. district judge in southern Arizona in modern times. And it is with a great deal of pride and pleasure that I urge this committee to recommend and the Senate to confirm the nomination. You will make no mistake with this candidate.

I defer to Congressman McNulty.

The CHAIRMAN. We will be glad to hear from you.

STATEMENT OF HON. JAMES F. McNULTY, JR., A U.S. REPRESENTATIVE FROM THE STATE OF ARIZONA

Mr. McNULTY. Thank you, Mr. Chairman. Good afternoon.

My testimony will be in two short pieces. The first are my own qualifications.

I am a member of the bar association of Arizona. That is my life, my identity, my profession, my persuasion, my meaning, my real life. I have been a member of the Board of Governors of the State bar of Arizona and the American Judicial Society, a member of almost all the committees of the State bar at one time or another, a member of the law college association of the University of Arizona, member of the board of advisors of the University of Arizona. And I feel qualified to testify on the subject of Mr. Browning.

I have had the pleasure of appearing once before you testifying on behalf of the nomination of the now Justice Sandra Day O'Connor 2 years ago. Mr. Browning has been known to me for nearly 25 years as a lawyer on the other side of civil litigation. As a member of the county bar, we went through all the chairs there. That is a large bar association, some 1,200 lawyers. He is a member of the State bar where he went through all the chairs again.

He brings to this task—and the State has an integrated bar—his own personal honor, his professional competency, his fairness, and finally I think the quality that you simply cannot be a competent judge without, and that is a decent sense of humor.

He is known to all the members of the profession as a straight arrow. And he will perform admirably and usefully to the society of southern Arizona. And I would urge you most strongly to recommend him favorably to the Senate.

The CHAIRMAN. Thank you very much.

Mr. Browning, I want to congratulate you on being endorsed so highly by two prominent Members of the House of Representatives. And we will give your Senators a chance if they care to make statements. Otherwise, we will place their statements in the record. We are honored to have these Members of the House come over to this side of the Capitol. We are also glad to see you gentlemen. And come back again.

Mr. UDALL. Thank you.

Mr. MCNULTY. Thank you, Mr. Chairman.

The CHAIRMAN. Now, we will take up all you gentlemen if you want to come up to the table. We will swear you all in at once, and we will take you up in the order in which we started out.

Joseph J. Longobardi, Edward Leavy, Terrence Boyle, and William D. Browning, if you will all hold up your hand and be sworn.

[Nominees sworn.]

TESTIMONY OF JOSEPH J. LONGOBARDI, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF DELAWARE

The CHAIRMAN. Do you go by the title of Vice Chancellor Longobardi, is that correct?

Judge LONGOBARDI. Yes, Senator. Vice chancellor. But judge is just as easy if you prefer that.

The CHAIRMAN. And you have a long and interesting career in public service starting in about 1957 when you were admitted to the bar in Delaware. Since that time, you have been a deputy attorney general for the State of Delaware, associate judge for the Superior Court of Delaware.

Is the superior court the highest trial court?

Judge LONGOBARDI. That is right, Senator.

The CHAIRMAN. And now you are vice chancellor of the court of chancery for the State of Delaware.

Now, what do you believe will be the most difficult aspect of the transition from the State court to the U.S. district court? And how have you prepared yourself for this change?

Judge LONGOBARDI. Senator, I do not believe it is going to be much of a difficult problem for me at all. It appears that my life experiences, my professional experiences have been almost a preordained groundwork for getting into that court.

In the superior court, I had extensive trial experience. both civil and criminal. And in the court of chancery, I have extensive experience with regard to corporate litigation, which would fall in very nicely with the SEC and patent jurisdiction in that court.

The CHAIRMAN. Vice Chancellor Longobardi, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge LONGOBARDI. Senator, my general philosophy is to avoid that situation, if at all possible. I think those things are best left to people who have the expertise, the experience and training to do that job.

The CHAIRMAN. Vice Chancellor Longobardi, in answering a portion of the committee's questionnaire pertaining to equal justice under law, you answered in part, and I quote, "As a judge in the superior court of Delaware, I have used ministers as an alternative to prison."

Will you tell the committee the circumstances where you have used this alternative approach to prison and the recidivism rate of those individuals involved.

Judge LONGOBARDI. Senator, I was sort of adopted by a minister in my town while I was in private practice. And over those 17 years, he had occasion to refer people to me who could not afford their own counsel. And during those years I was able to perform some legal services for these people.

After going on the superior court bench, I frequently used this same minister to counsel young people who I thought only needed some opportunity to see what the other side was like, people from their own background, some person who had a background that was not privileged, and on occasion have probated these kinds of young people to him. Although there was not any statutory authority for that kind of probation, I did it because I thought I had the inherent jurisdiction to do it.

And almost to the man, those have been success stories. Primarily because this minister was able to deal with those people for a fairly long period of time on a 1-to-1 basis.

The CHAIRMAN. I presume you would have no qualms about carrying out the law, whether it is the death penalty or lesser punishment for crimes committed and would take the course of action that you feel is in the best interest of the public?

Judge LONGOBARDI. I have no qualms in following what is required of me.

The CHAIRMAN. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authoritities.

What does the phrase "judicial activism" mean to you?

Judge LONGOBARDI. Senator, this is an area that is obviously highly controversial. And you can talk to any different number of people and get different interpretations. I think I might answer that by telling you that my general philosophy in dealing with cases in my jurisdiction has been to use judicial restraint rather than judicial activism. I find that limiting the issues, looking very narrowly at jurisdictional questions, looking very narrowly at questions about standards serve me and serve my purposes better than trying to solve the world's problems.

The CHAIRMAN. We will now move on to Mr. Leavy, and without objection, we will place a short resume of each of these gentlemen in the record.

TESTIMONY OF EDWARD LEAVY, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF OREGON

The CHAIRMAN. Judge Leavy, you have had a long term of service in the State court dating back to 1957, I believe, when you became a district judge of Lane County district court, and in 1960 when you became sector judge. Since 1966, you served as U.S. magistrate.

Judge, do you feel that this experience will be beneficial to you as a United States district judge? And if so, how?

Judge LEAVY. Well, first of all, the State court experience helped me, of course, in becoming familiar with the mechanics of operating the court and knowing the limitations of those proceedings and the value of the State courts in the total picture. Having been a U.S. magistrate, I have had the experience of trying both jury and non-jury civil cases in the court in which I sat as judge. And all of those things I view as helpful.

The CHAIRMAN. Judge Leavy, it has been suggested that our prisons turn prisoners into more professional criminals. What in your opinion can or should be done to improve prison rehabilitation?

Judge LEAVY. From the judicial standpoint, Senator, I feel that the cause of rehabilitation would be served if we would make our sentences more swift and more certain and take away from prisoners the frustrating hope that somehow they are going to beat the rap after the case, that is after they are once tried and convicted, they should not be continually given a hope that they are somehow going to escape what has already been adjudicated.

The CHAIRMAN. Excuse me just a minute.

Judge, do you feel that a district court judge should assume direct control over complex issues in cases in order to avoid the effect of handling such cases?

Judge LEAVY. Yes, I do. I think that many cases need management in order to get them on towards termination and be sure that the parties are really interested in litigating their issues. If they are not, the cases should be out of the system. And if they are in the system, we should work to conclude them.

The CHAIRMAN. Judge, suppose you had a conflict between your own conscience and your own sense of justice and the clear meaning of a statutory or constitutional provision, how would you rule on a matter of that kind?

Judge LEAVY. Well, I would feel duty bound to rule in accord with the Constitution or the law as it is made clear. And I do not feel that each time a new judge is appointed, we accept a new constitution. And if I had any reservation about that from a standpoint of conscience, now would be the time to say so and opt out of the system.

If a person cannot accept this Constitution as a judge or as an officer of any branch of Government, he or she should not undertake it.

The CHAIRMAN. Now, suppose you felt very strongly that a certain statute was unconstitutional. Would you feel, although there might be a different feeling in your heart of the matter, would you feel that you would be willing to hold it unconstitutional in spite of some of the other judges above you?

Judge LEAVY. Yes, yes, I would.

The CHAIRMAN. Judge, I think that covers my questions to you. We will pass on to Mr. Boyle.

TESTIMONY OF TERRENCE W. BOYLE, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NORTH CAROLINA

The CHAIRMAN. Mr. Boyle, you have been in private practice I believe since 1974. You were counsel to a subcommittee up here in the House. Then you were legislative assistant to Senator Helms.

Mr. BOYLE. Yes, Mr. Chairman.

The CHAIRMAN. So you had considerable experience around here. How many years were you here in all?

Mr. BOYLE. I was here 6 years, Mr. Chairman.

The CHAIRMAN. You were born in New Jersey, then you decided to move to North Carolina after you served here?

Mr. BOYLE. That is right, Mr. Chairman.

The CHAIRMAN. Now, has your experience on the Hill been helpful to you in the practice of law?

Mr. BOYLE. Yes, Mr. Chairman. And hopefully it will be even more helpful if I am confirmed and sit on the bench. I think it has given me a perspective of the importance in the role of the legislative branch of Government in our system and the prerogatives that belong to the legislature. And I have been very sensitive to those.

The CHAIRMAN. And, Mr. Boyle, what kind of guidelines do you feel the judge should follow in determining propriety of Federal judiciary intervention in the State affairs? Are you concerned about strong advocates of public issues being appointed to a public bench?

Mr. BOYLE. Mr. Chairman, I think that the Federal courts must look first to their core of jurisdiction. And they are courts of limited jurisdiction. They must recognize that the States are the reservoir of general jurisdiction and sovereignty. And beyond the scope of Federal jurisdiction, the Federal courts ought not to wander.

The CHAIRMAN. Some of these judges have taken over the operation of school districts and State institutions and other matters which appear in the State.

Now, whether they did it because they felt it was necessary to prevent discrimination or whether they did it because they became archons with power or whether they felt it was their duty or what, how do you feel in general about letting the States run their own State institutions?

Mr. BOYLE. Mr. Chairman, there has got to be a bounds between the sovereignty of the States and the constitutional protections and rights of all of the people. So long as the States have honored that bounds, the Federal courts have no role to play in the State's rights.

The CHAIRMAN. I imagine under what you say you would be reluctant to have to assume jurisdiction somewhere in assigning a State institution so that the State could operate its own institutions without interference?

Mr. BOYLE. That is right, Mr. Chairman. The courts ought to limit themselves to judicial controversy and not broad administrative matters.

The CHAIRMAN. Now, we have included in the sentencing bill we passed in the Senate—the House has not passed it yet—sentencing commission that would set guidelines and standards for uniformity in sentencing.

Do you think that would be helpful?

Mr. BOYLE. I think it would, Mr. Chairman, so long as the court had some discretion in exceptional circumstances to either reduce or otherwise reflect the sentence to the particular case. But, by and large, that is a positive step.

The CHAIRMAN. If they went beyond those guidelines, they would have to explain why?

Mr. BOYLE. We have that in our North Carolina courts, and it is called presumptive sentencing. And it is very effective.

The CHAIRMAN. What, in your opinion, is needed to speed up the disposition of Federal cases? Some of the dockets are clogged and they cannot get a trial within the time period, and there is a limited time for criminal trials, as you know. And they have a difficult time getting those cases tried.

Do you think the judges have to work long hours, and are you willing to work longer hours?

Mr. BOYLE. The answer is yes, I am willing to work long hours. And I think judges should and do work longer hours. It may be the allocation of resources needs to be applied. Our district has been very successful in bringing its dockets current.

The CHAIRMAN. I know some Federal judges who have done a fine job who did work long hours and cleaned up the docket. And it has not been done in years.

Mr. BOYLE. Yes, Mr Chairman.

The CHAIRMAN. I think that is all the questions I have for you.

TESTIMONY OF WILLIAM D. BROWNING, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ARIZONA

The CHAIRMAN. Mr. Browning, I believe you have been a practicing attorney since 1960.

Mr. BROWNING. That is correct, sir.

The CHAIRMAN. And you have been nominated for a position of U.S. district court judge.

Do you foresee any difficulty in the transition from advocate to an impartial jurist?

Mr. BROWNING. No, I do not, Senator. And I have given the matter considerable thought. I have practices in these courts, I have worked within the bar association confines of State legislative bodies to improve and understand the court, not the Federal courts but the State courts. And I think that I have a good understanding of them and their work. And I think that I could make that transition reasonably well.

The CHAIRMAN. Now, I have seen judges in the courtroom, I am sure with arrogance of power, embarrass jurors and witnesses and court officials and others. And I have always felt that was completely unnecessary. The judge has all the power in the world, maybe more power than they ought to have. And it seems to me that people can be thoughtful of others. And I think they more or less call this judicial temperament.

Do you think you have the judicial temperament to handle matters in an even and balanced way?

Mr. BROWNING. Well, I would hope so, Senator. I have been on the receiving end of some of that treatment you have talked about over the years, and have the same opinions that you have about it. I think that the judge, since he can do something about disrespect if it is directed at him, has a higher obligation than the lawyer does to show respect. And I would hope that that would be my continuing view on the subject while I am on the bench.

The CHAIRMAN. Mr. Browning, how would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator or was not prepared to represent his client, what would you do?

Mr. BROWNING. I am not entirely sure. I think what I would probably do is recess court and ask to see both of them in chambers and try to explain that, if necessary, recess the case in order to give the other party time to secure competent counsel or to adequately prepare the case. It is sort of a tough question. To some extent, a judge should not become an advocate in the proceedings.

If it were a criminal case and it were so imbalanced, as you have described, I think there might be constitutional issues that would require that the case be handled—be recessed and new counsel assigned. If it were a civil case, I think I would handle it in the way I have described.

The **CHAIRMAN**. Mr. Browning, are there any circumstances where you would consider it appropriate to decide a case on some basis other than the one where the intent of the legislation or constitutional provision can be detected either through the text of the provision or surrounding legislative district?

Mr. **BROWNING**. No, sir, none that I can think of.

The **CHAIRMAN**. I presume you believe the Constitution says what it means and means what it says?

Mr. **BROWNING**. That is correct, Senator, I do.

The **CHAIRMAN**. And you will abide by the Constitution in the administration of justice in your court?

Mr. **BROWNING**. I certainly would.

The **CHAIRMAN**. I think that completes the hearing.

I will be very pleased to have you all introduce your families.

Would you like to introduce yours?

Judge **LONGOBARDI**. Thank you, Mr. Chairman.

I would like to introduce my wife and my son, Joseph.

The **CHAIRMAN**. We are very pleased to have you all with us.

Any family or friends, Judge Leavy?

Judge **LEAVY**. Senator, I would like to introduce Ed Allen, a friend of mine from Eugene, OR, and Bert Johnson, also a friend of mine from Eugene, OR.

The **CHAIRMAN**. Glad to have you.

Mr. Boyle.

Mr. **BOYLE**. My family is not here, Mr. Chairman. Thank you.

The **CHAIRMAN**. Do you have any friends here?

Mr. **BOYLE**. Just Mr. Frumin and Mr. Wilson.

The **CHAIRMAN**. Senate staff, we are glad to have you.

Mr. Browning.

Mr. **BROWNING**. I would like to introduce my wife.

The **CHAIRMAN**. Is that your wife or your daughter?

Mr. **BROWNING**. My wife, Senator.

The **CHAIRMAN**. Senator East has a resolution here by the chairman of the board of commissioners endorsing Mr. Boyle for judgeship. Without objection, that will be put in the record.

[The following was received for the record:]

CHOWAN COUNTY, NC

RESOLUTION

Whereas, Mr. Terrence W. Boyle is a resident of Chowan County and a highly respected attorney in the prestigious law firm of LeRoy, Wells, Shaw, Hornthal and Riley; and

Whereas, Mr. Boyle has served in many civic and professional associations including Secretary-Treasurer of the First Judicial District Bar, Vice-President of the District Bar, lecturer in the Continuing Legal Education Program at Wake Forest University School of Law, a member of both the Edenton Historic Commission and the Elizabeth City Rotary Club; and

Whereas, he also served as legislative assistant to Senator Helms and as Minority Counsel to the Committee on Banking, Finance and Urban Affairs in the United States House of Representatives; and,

Whereas, Mr. Boyle graduated from American University Law School in 1970; and

Whereas, Mr. Boyle has gained the esteem and respect of both the legal community and the citizenry of northeastern North Carolina; and,

Whereas, Mr. Terrence W. Boyle has been recommended by United States Senator Jesse Helms to President Ronald Reagan for nomination as United States District Judge for the Eastern District of North Carolina.

Now, therefore, the Chowan County Board of Commissioners expresses its wholehearted support for the appointment of Mr. Terrence W. Boyle to this judgeship and urges all members of the United States Senate to expeditiously approve this well-earned nomination.

Resolved, this day, February 6, 1984.—Anne K. Spruill, Clerk.

The CHAIRMAN. Does anybody have anything else they wish to say? If not, we stand adjourned.

[Whereupon, at 2:50 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

JOSEPH J. LONGOBARDI

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF DELAWARE

Birth: April 29, 1930, Wilmington, DE.

Legal residence: Delaware.

Marital status: Married to Maud L. Lasher, 2 children.

Education: 1948-49—University of Maryland; 1949-1950—University of Delaware; 1950-1952—Washington College, B.A. degree; 1952—University of Maryland, School of Law; 1954-1957—Temple University School of Law, LL.B. degree.

Bar: 1957—Delaware.

Experience: 1957-59 and 1961-64—Private practice; 1959-61—Deputy Attorney General, State of Delaware; 1965-1972—Longobardi & Schwartz; 1972-1974—Murdoch, Longobardi, Schwartz & Walsh, P.A.; 1974—Murdoch, Longobardi & Walsh; 1974-82—Associate Judge, Superior Court of Delaware; 1982 to present—Vice Chancellor, Court of Chancery, State of Delaware.

EDWARD LEAVY

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OR OREGON

Birth: August 14, 1929—Aurora, OR.

Legal residence: Oregon.

Marital status: Married to Eileen Hagenauer Leavy, 4 children.

Education: 1947-50—University of Portland, A.B. degree; 1950-1953—University of Notre Dame, LL.B. degree.

Bar: 1954—Oregon.

Experience: 1953-54—Private practice, Eugene, OR; 1954-1957—Deputy district attorney, Lane County, OR; 1957-1961—District judge, Lane County District Court; 1961-1976—Circuit judge, Lane County Circuit Court; 1976 to present—U.S. magistrate, District of Oregon.

TERRENCE W. BOYLE

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NORTH CAROLINA

Birth: December 22, 1945, Passaic, NJ.

Legal residence: North Carolina.

Marital status: Married to Debra Ann Ellis Boyle, 3 children.

Education: 1963-67—Brown University, B.A. degree; 1967-70—American University, Washington College of Law, J.D. degree.

Bar: 1970—District of Columbia; 1974—North Carolina.

Experience: 1970-73—Minority Counsel, Subcommittee on Housing Committee on Banking and Currency, U.S. House of Representatives; 1973—Legislative Assistant to U.S. Senator Helms; 1974 to present—LeRoy, Wells, Shaw, Hornthal & Riley (firm has had other names), associate 1974-77, partner 1977 to present.

WILLIAM D. BROWNING

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ARIZONA

Birth: May 19, 1931, Tucson, AZ.

Legal residence: Arizona.

Marital status: Married to Zerilda Sinclair Browning, 4 children.

Education: 1949-54—University of Arizona, B.S.; 1957-60—University of Arizona, LL.B. degree.

Bar: 1960—Arizona.

Military service: 1954-57—U.S. Air Force; 1958-61—Arizona Air National Guard.

Experience: 1960-62—Estes & Browning, Tucson, AZ, 1962-69—Rees, Estes & Browning; 1969-72—Estes Browning & Zlaket; 1973-74—Browning & Druke; 1974-76—Browning, Druke & Hawkins; 1976-81—Slutes, Browning, Zlaket & Sakrison; 1981 to present Slutes, Browning, Sakrison & Grant.

CONFIRMATION HEARING ON:

LLOYD D. GEORGE AND ALICEMARIE H. STOTLER

WEDNESDAY, APRIL 25, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Laxalt.

Staff present: Vincent DeVane Lide, chief counsel and staff director; Robert J. Short, chief investigator; Allan Spence, investigator, Jack F. Nash, Jr., and Frederick D. Nelson, counsels.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We are meeting today to consider the confirmation of two Federal judges, both for the district court. First is Lloyd D. George, of Nevada, to be U.S. district judge for the district of Nevada.

I see Senator Laxalt is here, so we will go ahead and get started. Is Senator Hecht coming, do you know, Senator Laxalt?

Senator Laxalt. Yes sir, it is my understanding that he is going to try and come by.

The Chairman. Have a seat, Senator. We are delighted to have you with us, and we would be very pleased to hear from you.

STATEMENT OF THE HON. PAUL LAXALT, A U.S. SENATOR, FROM THE STATE OF NEVADA

Senator Laxalt. I thank the chairman.

It is a very great privilege for me to introduce to this committee an extraordinarily talented and dedicated public servant.

Not only has Lloyd George already established an excellent judicial record in his years on the bankruptcy bench; he has also distinguished himself as a leader in his church and in a multitude of civic organizations, and as a loving husband, father, and grandfather. I might indicate to the chairman and the committee that his wife is also present.

The Chairman. His wife hardly looks like a grandmother.

Senator Laxalt. I came to know Lloyd George when, as Governor of Nevada, I worked with him in his capacity as president of the Clark County Association for Retarded Children. In his efforts to help meet the needs of Nevada's handicapped young people, he displayed a concern for the public good that has characterized his entire career.

After his graduation from Brigham Young University, Judge Lloyd George served as a fighter pilot in the Air Force before going on to law school at the University of California at Boalt. Following more than a decade of private law practice, he was appointed a judge on the U.S. Bankruptcy Court, where he has served for the past 10 years—and, I might say, with great distinction.

Recognized as one of the Nation's finest bankruptcy jurists, Judge George is a member of the National Bankruptcy Conference, and is one of five judges in the ninth circuit to serve on the Bankruptcy Appellate Panel. He has also had the honor of serving on the National Board of the Federal Judicial Center. And also, Mr. Chairman, he has been equally successful and energetic in his civic involvements. While his community service efforts are too numerous for me to catalog here, I will note that he is a member of the board of trustees of the National Conference of Christians and Jews and that he is also active in the Business and Professional Association of Southern Nevada.

In his new job, Judge George will be able to put his public service commitment and judicial experience to good use. There is a tremendous backlog of cases in the Federal courts of Nevada that must be dealt with at once. I am confident that Lloyd George, who keenly understands the proper, well-defined role of a judge in our democratic system of government, will handle this task superbly.

I urge his prompt confirmation.

Also, Mr. Chairman, I would like to thank, the staff of the committee because, recognizing how urgent it is to Nevada that this appointment be filled, they have worked swiftly with the Federal Bureau of Investigation to conclude the preliminary work.

I thank the chairman and the committee.

The **Chairman**. We rushed it up at your request, because we understood the urgency involved out there, and I am very pleased we could go forward with this hearing here today.

Senator **Laxalt**. I might say also that I have had, as the chairman has, occasion to appoint many judges. These nominations are often controversial and many times not without a good deal of negative testimony. I can say without qualification that in the appointment of this man, I have had nothing but compliments. There has been absolutely no criticism, which, probably more than anything else, speaks to his great credit.

The **Chairman**. Well, you have given him a high recommendation. Are you going to stay a minute while Senator Hecht testifies?

Senator **Laxalt**. I would be pleased to.

The **Chairman**. Senator Hecht, we will be glad to hear from you now.

STATEMENT OF HON. CHIC HECHT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator **Hecht**. Thank you, Mr. Chairman.

After hearing Senator Laxalt's remarks, they are basically the same as what I have. I just would like to reiterate about the great feeling everyone in Nevada has for this distinguished judge. He has served with great distinction. He has the complete support of the legal profession. He is an attorney's attorney. He is a wonderful husband, a wonderful father, deeply religious, and is respected by the community as a dedicated citizen, and lastly, but not least, he has served his country in time of war, and he is a great American.

So, it is my privilege to be here today.

The CHAIRMAN. Thank you very much.

Mr. George, I just want to say that you could not have been recommended by two finer Members of the Senate than Senator Laxalt and Senator Hecht. Senator Laxalt has been here for a number of years. I have had the pleasure of serving with him, and I do not know of a man in the Senate who is held in higher esteem than he is.

Senator Hecht is a new man, and he has made a fine impression here, and a lot of friends, and you are very fortunate to have both these men endorse you so highly. If I did not know you, I would be willing to vote for you on their recommendation.

We are very pleased to have them here. If they wish to go, they can go; if they wish to stay, they can stay. But we will proceed now.

We might just go ahead and question you while we are waiting on Senator Wilson.

If you will stand now, Mr. George, I will swear you in.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Judge GEORGE. Yes.

The CHAIRMAN. Please have a seat.

TESTIMONY OF LLOYD D. GEORGE, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEVADA

The CHAIRMAN. Judge George—you are a bankruptcy judge?

Judge GEORGE. Yes.

The CHAIRMAN. You have been a bankruptcy judge for the district of Nevada since 1974, I believe.

Judge GEORGE. That is correct.

The CHAIRMAN. This is a trial court of special jurisdiction, handling cases arising out of the Bankruptcy Code. I am confident that you are very knowledgeable of the laws pertaining to bankruptcy and related matters. I wonder, however, if you foresee any difficulty in the transition from a code of limited jurisdiction to the Federal district court, as it has such broad powers?

Judge GEORGE. Mr. Chairman, I certainly see some challenges, but I do not see any insoluble challenges. Clearly, the courts are very different. I will be dealing with a far broader spectrum of constitutional law questions. I will be dealing with criminal matters. I have not as a judge done so in the past. Jury trials will be somewhat different. I have tried a number of jury trials as a bankruptcy judge, and I have had good experiences with them, and I think the litigants and counsel have been pleased.

I think there are some pluses, as well—the fact that I am comfortable in the courtroom, that I have handled a good many major civil matters and managed cases to a major extent, I think, will be helpful. But I am anxious and happy to meet the challenges that I am satisfied confront me.

The **Chairman**. Judge George, do you feel that a district court should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge **George**. Senator Thurmond, I feel that a judge is in part a manager, and I think, at least in my judgment, a judge should be familiar with the case and do whatever is necessary to make it move.

I think the line between assuming the attorney's role and controlling the case is an obvious one, and I think a judge should not interfere with the presentation of competent counsel. But I do think that a judge is a manager and is obligated, I think, to call upon attorneys for status reports, occasionally—pretrial conferences, I think, can be extremely important—and pretrial preparation can, I think, make a 1-week trial out of perhaps a 2-week trial. So I do think that a judge has management responsibilities.

The **Chairman**. Judge George, would you tell the committee how you would handle an instance in which counsel from one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interest of his or her client?

Judge **George**. Senator Thurmond, I suppose it would depend somewhat, if one were dealing with a criminal trial. While I am of the belief that in criminal matters, one is entitled to a fair trial, not necessarily a perfect trial, I suppose there would have to be a determination and an evaluation as to the level of competency, and it may be very wasteful to proceed if it were evident that the competency level were such as not to be able to have a fair trial.

In a civil action, if it were a jury trial, it seems to me that, again, a judge should be cautious if he were assisting, as I think judges can properly do, not to create a feeling of bias in favor, especially for the jury.

My inclination would be and has been to counsel with attorneys in chambers, to try to give them some direction, and to try to encourage always a meaningful opening statement so that the attorney would think about where he was going. Again, much of this could perhaps be cured by wise pretrial procedures, in the first instance. If it were evident that it was a major matter, and considering all of the factors, it may be well, even in a civil case, to invite and encourage a continuance and perhaps impose sanctions so that the other party prepared would not be put in an unfair circumstance because of the unpreparedness of an attorney.

The **Chairman**. Judge George, in response to a portion of the committee questionnaire concerning judicial activism, you stated in part: "I believe that courts should be exceedingly careful in using their authority to avoid usurping the role of the other branches of Government."

I am very glad to see you make that statement, because it seems to be popular today for judges, because they can usurp authority, to take over control of school districts, hospitals, and other State institutions which ought to be under the State and not the Federal Government.

Now, I was just wondering, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge GEORGE. Again, Senator Thurmond, it would seem to me, presupposing that the court had properly dealt with a supposed constitutional problem—the prison circumstance in Nevada comes to mind, Senator—and presupposing that a decision had been made that facilities were inadequate, it would seem to me that the court should exercise a good deal of restraint and it should allow other branches of Government to deal with those problems. There may be any number of constitutionally acceptable solutions, and it would seem to me that all of those should be explored.

I suppose it would be important that the order be specifically explicit so that other branches of Government would know what is, in fact, expected. I think, as well, it would be important to maintain a rapport of patience and a step proceeding, perhaps, to accomplish a proper end.

I think only as a very last resort, if one were dealing with recalcitrant parties, would it be appropriate to utilize contempt powers or writ of mandamus, but I think anyone with a great deal of power should exercise it very cautiously and wisely, Senator Thurmond.

The CHAIRMAN. Judge, you come with a fine reputation. You are recommended very highly by two outstanding Senators, and I want to wish you a successful tenure on the bench. I will try to expedite this matter by getting your name on the agenda for tomorrow. And your two Senators can help me get a quorum of this committee so we can get you confirmed tomorrow.

Senator LAXALT. We pledge our complete cooperation, Mr. Chairman.

The CHAIRMAN. Fine. We are delighted to have you with us, and you are now excused.

Judge GEORGE. Thank you so very much.

The CHAIRMAN. And thank you, Senators, for coming and testifying in his behalf.

Senator LAXALT. We thank the chairman.

The CHAIRMAN. Our next nominee is Alicemarie H. Stotler. We are very pleased to have you with us, and Senator Wilson is here now, and we will be glad to hear from him.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman.

I have the great pleasure to introduce to the committee today Alicemarie Stotler, the President's nominee for the Federal district court for the Central District of California. She comes with a very distinguished background and record, and I will hit only the highlights of these and assure the chairman that there is far more than he has time to hear.

The CHAIRMAN. I would be glad to put her résumé in the record, if you wish, to save you time.

Senator WILSON. All right, sir. We will be grateful for that.

Let me just explain that I think she is superbly qualified by education, by experience, and by her own particular talents. I must tell you that she received the highest rating possible from the judicial screening committee that I engage. She enjoys a reputation that is not just enviable, but—I will put it this way, Mr. Chairman—I hope that all of my recommendations are as warmly received and as broadly applauded as has been this one.

Alicemarie Stotler is a graduate of the University of Southern California. She also earned her legal degree there. While at the University of California, she was the winner of a statewide moot court competition. She also won the American Jurisprudence Award for Federal Civil Procedure, which will stand her in good stead in light of her oncoming responsibility.

She is admitted not only to the California State Bar, but to the Federal court bar for the northern and central districts, and was admitted to the U.S. Supreme Court.

She is certified by the California Board of Legal Specialization as a criminal law specialist, in recognition of her experience and performance as the first full-time woman deputy district attorney in the Office of the Orange County District Attorney, a very fine office.

She has won high commendation from her colleagues of the bar and also on the bench, as a criminal law specialist and also as a lawyer in general private practice. She comes with considerable judicial experience. She spent 2 years on the municipal court bench, and thereafter was elevated to the superior court bench. And I think perhaps it says a great deal that she was voted Judge of the Year, not only by the Orange County Trial Lawyers' Association in 1978, but by the Orange County Trial Lawyers' Secretaries, who perhaps know as much as the trial lawyers and are as good or better judges of character.

The list of her professional, charitable, and educational affiliations is very lengthy. She, as a new member of the municipal court, served as a justice pro tempore in the appellate courts of California, which is highly unusual. She has chaired the family conciliation court committee of the superior court. She has served on sections of the California State Bar Association having to do with a number of different subjects, and during her tenure on the Orange County Superior Court, served on the criminal panel, the civil law and motion calendar, the family law panel, general trials, appellate department, and general trials.

She is, despite her obvious tender years, someone who comes to this new responsibility not just adequately prepared, but I will say again, superbly prepared. She has been a teacher of the law. She is a skilled jurist, acknowledged to be so, acknowledged to be one of the finest prosecutors in the history of that Orange County District Attorneys' Office.

So I will simply say, sparing the Chair further explanation, and perhaps, sparing the candidate embarrassment, that it is an unusual pleasure and, in fact, a privilege for me to be able to introduce Alicemarie Stotler and to commend her to this committee's attention.

The CHAIRMAN. Judge Stotler, I want to congratulate you upon being appointed by the President to be a Federal district judge, and you are fortunate to have the recommendation of such an able and fine Senator as Senator Wilson of California. He is a new Senator here, but he has gained great stature already and is held in high esteem by his fellow Senators. I am not going to ask him to stay long, if he wants to go, but he is welcome to stay.

Senator WILSON. Thank you very much, Mr. Chairman.

The CHAIRMAN. Judge Stotler, if you will stand, I will swear you in for your testimony.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mrs. STOTLER. Yes.

The CHAIRMAN. I believe your husband is here. Would you wish him to be recognized?

Mrs. STOTLER. If I may, Mr. Chairman, I have both my mother present, Mrs. Loretta Huber, from California.

The CHAIRMAN. We are delighted to have all of you here.

Mrs. STOTLER. And my husband, Mr. James Stotler.

Thank you so much.

The CHAIRMAN. Do you have some more members back there?

Mrs. STOTLER. I happen to have some unexpected rooters, if I may, Mr. Chairman. They are going to give a speech here, and they just happened to drop by.

The CHAIRMAN. We are very glad to have them here.

STATEMENT OF ALICEMARIE H. STOTLER, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

The CHAIRMAN. Judge Stotler, I believe you sat for approximately 2 years as a municipal court judge in Newport Beach. Is that right?

Mrs. STOTLER. Yes, sir.

The CHAIRMAN. And for approximately 5 years as a superior court judge in Santa Ana, CA.

Mrs. STOTLER. That is correct.

The CHAIRMAN. Is the superior court judge out there the highest trial court in the State?

Mrs. STOTLER. Yes, it is.

The CHAIRMAN. Do you have the power of death in criminal cases?

Mrs. STOTLER. That is correct. It is general jurisdiction, and I have heard death penalty cases, yes.

The CHAIRMAN. Unlimited jurisdiction in civil matters, I presume.

Mrs. STOTLER. Correct.

The CHAIRMAN. Judge Stotler, do you feel that this experience will be of assistance to you in performing the duties of a Federal district court judge?

Mrs. STOTLER. Oh, I certainly do, Mr. Chairman, yes. I would expect that having learned to manage the caseload of a municipal court and then the superior court will be something that will help to cope with what I understand to be the volume in the district to which I hope to be assigned.

In addition, because of the breadth of cases, most civil matters that I would anticipate appearing in the district court are matters that I have seen before, and as the Senator just mentioned, I have handled criminal cases from A to Z, with all possible consequences, and so I feel somewhat comfortable dealing with those types of matters, as well. I think that experience should hold me in good stead.

The CHAIRMAN. You do not think there will be any trouble making a transition from that experience in the practice of law to be a Federal district judge, do you?

Mrs. STOTLER. What troubles there might be, Mr. Chairman, I am confident that I can and will overcome, and I look forward to learning new substantive matters with which I have not dealt before, but I think I have applied myself to scholarly studies in the past, and I would like to do it again.

The CHAIRMAN. You have practiced in the Federal court, I assume.

Mrs. STOTLER. My practice was minimal with respect to Federal matters, limited primarily to magisterial matters that were in Orange County as opposed to Los Angeles County. But I have been reading diligently already on matters of Federal procedure as well as criminal procedure.

The CHAIRMAN. Now, I want to ask you a question about judicial temperament. I think it is very important for a jurist to possess proper judicial temperament. I have seen some judges embarrass jurors and witnesses and lawyers in the courtroom and want to flaunt their power, and I think that is just completely out of reason and should never be done. I think the person with the most power should be humble, so to speak, because he has got all the power he wants. A Federal judge has tremendous power.

How do you feel about judicial temperament?

Mrs. STOTLER. Well, I agree with the Senator's remark. Part of the philosophy that I have about judging is that the power goes with the office, and I am merely a conduit, although the expression of that particular power brought to bear on a certain case that is before me, and I do not understand why it is that a judge would want to embarrass, certainly, jurors, who are called upon out of the blue to serve on a case, and I do not think that that begets any efficiency. It seems to me that if the judge is wrapped up in trying to vindicate his or her ego to explain what a powerful individual he or she might be, we are not accomplishing the goal, which is to litigate the case at hand and hopefully, effectuate justice.

I think if we were doing labelling of judicial temperament, it would include qualities of patience, treating litigants and attorneys and jurors with dignity, intelligence, courtesy, and basically, trying to attend to the matter at hand, which is to dispense justice, handle litigation promptly and efficiently, without trying to demean or belittle anyone.

The CHAIRMAN. Judge, do you feel it would be helpful to you as a district court judge to have a sentencing commission to establish uniformity in sentencing? We have passed a bill through the Senate here, and a crime package that would have a commission that would set the minimum and maximum sentences, and a judge would have to explain if the judge went beyond or below those standards.

Mrs. STOTLER. I am sure on a limited basis, this is something I have had experience with in the California system. Sentencing is usually one of the most difficult jobs for any judge to deal with, because the punishment has to fit the crime; the defendant and society's rightful needs in perhaps avenging some wrong which has been done society. Such a commission, it seems to me, would be a very welcome addition to the criminal justice system, so that nationwide, the Congress and the judiciary would have guidelines as to where a sentence should fall in a criminal case, and certainly, a judge is in the best position to make explanations as to why a sentence needs to be higher or lower in any given case. This sounds like a very good idea to me.

The CHAIRMAN. There are several elements I think a judge has to consider in sentencing. Some years ago, I was a circuit judge, which was the highest trial court second to the superior court in California, and one of the most difficult things I had to do was to try to pass the right sentence on people. Sometimes, I wondered if I did the right thing, because some have backgrounds that are far different from others, and some, the motive of the crime is far different—it may be murder, but the viciousness of it or the matters involved. And then, you have got your public here, and you have got to set an example for the public. And it is a very difficult thing to try to pass the proper sentence in a case. And your experience as a superior court judge ought to be of considerable help to you along that line.

Mrs. STOTLER. I would hope so, Senator, and I think perhaps renewed emphasis on participation by people who have been wronged by crimes may be helpful input, so that if it is appropriate under the bill just mentioned, where the court can hear from people who have been wronged by the crime. Sometimes, there is some feedback there that hopefully will tell the judge that the sentence is right, as opposed to wrong.

The CHAIRMAN. If you could just read people's minds, and what is in their minds as to whether they are truly sorry for what they did and will not repeat, it would make such a big difference. But of course, you cannot do that. You have to judge their demeanor as best you can during the trial, and their past history, and the prospect of committing a crime again, and there are a lot of factors you have to take into consideration, because after all, the welfare of the public is paramount, in my opinion.

Mrs. STOTLER. That is correct.

The CHAIRMAN. In response to a portion of the committee questionnaire concerning judicial activism, I believe you said,

> Most members of the judiciary try to apply the law to a specific problem guided by statute, regulation, or case precedent. On rare occasions, such guidance is lacking, as on those occasions as when the court is most vulnerable to the criticism under discussion, because the individual judge is creating the law, rather than applying a known commodity.

Judge, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Mrs. STOTLER. Usually, the subject matter of the lawsuit will have been addressed at some point by the appropriate legislative body, and the judge has some guidance by whatever may already be on the books in terms of what is the subject for legislative action.

When I sat on the civil law and motions calendar, we would see cases come through that were basically made up with a new cause of action that had not been legislatively recognized, and in those instances it seemed to me that if it was a policy matter that affected great numbers of people, it was probably not a matter for judicial decisionmaking, but something that had to be subject to legislative scrutiny. The judiciary is rarely in a position to make up good policy which will have broad application, and rather, is better designed to deal with a given controversy where there is a justifiable issue involved.

So I usually feel that I can recognize a case that is the kind that belongs to the Congress, and that is the body that should deal with the problem if a remedy is required, rather than a judicial decision being called for. It depends upon the subject matter, usually.

The CHAIRMAN. I am sure a great many judges attempted to take actions that really fall in the legislative realm, so to speak, but I think if they would just ask themselves the question, which branch does this come under—is the legislative body to make the law; is it an executive function to administer the law, or is it a judicial matter to interpret the law—and we have had so many judges, though, that look like they want to legislate, and from all I have known and heard about your background, I feel assured that you will stick to the judicial branch.

Mrs. STOTLER. I certainly hope so, Senator.

The CHAIRMAN. I want to mention to you that I got a call a couple of days ago from Judge Charles E. Simon, the chief district judge in South Carolina, who is out in California at a meeting, and he recommended you highly. I do not know whether you have met him or not, but he had been talked to by some lawyers or judges out there about you, and he is a former law partner of mine, too, so I just want to tell you that he gave you a fine recommendation.

Mrs. STOTLER. Well, I thank you for telling me that. I am quite surprised, and I did not know.

The CHAIRMAN. Judge Charles E. Simon, Jr. You might want to drop him a note. He is in Aiken, SC, where I am from.

Mrs. STOTLER. I will do that, Senator.

The CHAIRMAN. Now, without objection, I am going to ask the reporter here to place a résumé of you and also Judge George in the record.

Those are all the questions I have. I hope you have a successful and happy tenure on the bench.

Mrs. STOTLER. Thank you very much.

The Chairman. And we will try to get you on the agenda for tomorrow and get quick action. Sometimes we have trouble, with the Senators so busy, in getting a quorum at the Judiciary Committee. So tell Senator Wilson to be sure to speak to as many Senators to try to help us get a full quorum tomorrow.

Mrs. STOTLER. Thank you. I will.

The Chairman. We now stand adjourned.

[Whereupon, at 2:35 p.m., the committee was adjourned.]

BIOGRAPHIES

LLOYD D. GEORGE

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEVADA

Birth: February 22, 1930, Montpelier, ID.

Legal residence: Nevada

Marital status: Married to LaPrele Badouin George, 4 children.

Education: 1948-50 and 1952-55—Brigham Young University, B.S. degree in 1955; 1958-1961—University of California Boalt Hall, J.D. degree.

Bar: 1961—Nevada.

Military service: 1955-1958—U.S. Air Force.

Experience: 1961-1965—Law Office of Jack Pursel; 1965-69—Private practice; 1969-71—Albright, George, Johnson & Steffen, partner; 1971-74—George, Steffen & Simmons, partner; 1974 to present—U.S. bankruptcy judge, District of Nevada.

ALICEMARIE H. STOTLER

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: May 29, 1942, Alhambra, CA.

Legal residence: California.

Marital status: Married to James A. Stotler.

Education: 1960-61—UCLA; 1961-64—University of Southern California, B.A. degree; 1964-67—University of Southern California School of Law, J.D. degree.

Bar: 1967—California.

Experience: 1967-73—Assistant district attorney, Orange County; 1973-76—Stotler & Stotler; 1976-78—Judge, municipal court, Orange County; 1978-83—Judge, superior Court, Orange County; 1983 to present—Stotler & Stotler.

CONFIRMATION HEARING ON CAROL E. DINKINS

WEDNESDAY, MAY 9, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Specter and Biden.

Staff present: Robert J. Short, chief investigator; and Cynthia C. Lebow, minority staff director.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. I see the distinguished Senator from Texas here so we will proceed. Senator Tower, we are delighted to have you with us. Will you have a seat and make your presentation. The committee will come to order.

I might just say a word before you start.

I am very pleased today to have before the committee the nominee for Deputy Attorney General of the United States, Mrs. Carol E. Dinkins.

This is a nomination of some historic significance in that Mrs. Dinkins is the first woman ever nominated for the position of Deputy Attorney General.

Mrs. Dinkins is well known to many members of this committee. She served as Assistant Attorney General for the Land and Natural Resources Division at the Department of Justice from 1981 to 1983, and I might add that her performance in this position brought great credit to herself and to the Department. After leaving the Department of Justice, Mrs. Dinkins returned as a partner in the law firm of Vinson & Elkins where she previously served from 1973 to 1981.

Mrs. Dinkins is an individual of fairness, honesty, independence, and experience. She has the ability to mediate and resolve problems while, at the same time, continuing to maintain the respect of all parties involved. I am sure she will meet the many challenges ahead with perseverance and fortitude.

The President is to be commended for nominating an individual of such high caliber. I am confident Mrs. Dinkins will serve in an exemplary manner and will make an outstanding Deputy Attorney General. She is from Texas, and the senior Senator from Texas, Senator Tower, one of the most influential members of the Senate, is here to endorse her.

Senator Tower, we would be glad to hear from you.

STATEMENT OF HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator TOWER. Thank you very much, Mr. Chairman.

It is really a great pleasure and honor for me to present to the committee today a native Texan who has been nominated by the President to be Deputy Attorney General of the United States, Mrs. Carol E. Dinkins.

Mrs. Dinkins is a stranger neither to the committee nor the Department of Justice. As you noted, Mr. Chairman, she recently served as Assistant Attorney General for Land and Natural Resources from 1981 to 1983. In July of last year, after a successful tenure at the Department, she returned to her former law firm in Houston, Vinson & Elkins—just a little old country law firm down in Houston which I think now is probably one of the largest law firms in the United States. The numbers change from time to time so we are not sure.

Mr. Chairman, the mere fact that the President decided to call Carol back into service to this Nation and the administration is indicative of the respect for and esteem in which the President holds Mrs. Dinkins. Further, it depicts clearly the effective manner in which she performed her duties as Assistant Attorney General.

Carol graduated from the University of Texas at Austin in 1969 with a bachelor of science degree in education, after which she received her juris doctor degree from the University of Houston College of Law in 1971.

Prior to joining Vinson & Elkins, Carol was on the adjunct law faculty at the University of Houston while working at the Texas Law Institute of Coastal and Marine Resources. In 1973, she became associated with Vinson & Elkins and was made a partner in 1979. She was practicing with the firm until her nomination by the President in 1981 as Assistant Attorney General.

She is a member of the American Bar Association, the State Bar of Texas and the Houston Bar Association, and is a fellow of the Texas Bar Foundation. Additionally, she is a member of the Houston Chamber of Commerce, and other civic and professional organizations. While serving as Assistant Attorney General, Mrs. Dinkins was appointed as Chairman of the President's Task Force on Legal Equity for Women, as a Commissioner on the Native Hawaiian Study Commission, and as a Member of the National Consumer Cooperative Bank Board.

The Nation is privileged to have among its citizenry those individuals who are willing to make personal sacrifices to become public servants. Abigail Adams once asked, "If we do not lay out ourselves in the service of mankind, whom should we serve?" Mrs. Dinkins has, once again, made this sacrifice to serve mankind, and I am pleased that the President has chosen to nominate Carol to the No. 2 position in the Department of Justice.

It is my hope, of course, Mr. Chairman, that the committee will act expeditiously and favorably on the nomination of this enormously capable and prestigious person for this extremely important position.

The **Chairman**. Mrs. Dinkins, because of your own fine qualities and experience, together with the splendid endorsement given you by the senior Senator from Texas, chairman of the powerful Armed Services Committee, I am assured of your approval.

Senator, you may remain or leave if you wish to do so.

Senator Bentsen submitted a statement supporting Mrs. Dinkins, which, without objection will be put in the record.

[Material submitted for the record follows:]

Prepared Statement of Senator Lloyd Bentsen

Mr. Chairman, only 3 short years ago I appeared before your committee to support Ms. Dinkins' nomination for the post of Assistant Attorney General for the Land and Natural Resources Division.

Today, I have again come before the committee to endorse this historic nomination of the first woman Deputy Attorney General of the United States. A native Texan, Ms. Dinkins, brings a wealth of experience and stellar credentials to this important post.

Ms. Dinkins is a graduate of two distinguished Texas academic institutions: The University of Texas at Austin, and the University of Houston Law Center. Ms. Dinkins' academic, private and public sector work experiences have distinguished her as a leading authority in environmental and land use law.

In 1979, Ms. Dinkins attained the distinction of being named the first woman partner of one of the country's finest law firms, Vinson & Elkins, after 6 years of association. Her 1981 Senate confirmation to Justice provides Carol Dinkins with an additional honor of being named the first woman Assistant Attorney General for the Land and Natural Resources Division.

During her tenure with the Department of Justice she established the Environmental Crimes Unit, which investigates and prosecutes criminal violations of environmental statutes, such as the Hazardous and Clean Water Acts.

I believe Carol Dinkins' integrity, intellect, and demonstrated ability makes her the leading choice for this important appointment.

Thank you.

The **Chairman**. If you will stand up we will swear you. Do you swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. **Dinkins**. Yes, I do.

The **Chairman**. Senator Specter, do you have a statement to make?

STATEMENT OF SENATOR ARLEN SPECTER

Senator **Specter**. I want to thank the senior Senator from Texas for his appearance here today.

I wanted to be present for at least part of this proceeding to express to you my respect for your candidacy and the very great importance the position holds. I know others of the Judiciary Committee would want to be here, but they all have very busy schedules. You are up for a very, very important position.

The **Chairman**. Without objection, we will place a statement by the junior Senator from Texas, Senator Lloyd Bentsen, in the record following the statement of the senior Senator from Texas, Senator Tower.

Mrs. Dinkins, would you like to introduce any of your family or friends who are here with you?

Mrs. **Dinkins**. No thank you, Senator.

The **Chairman**. Incidentally, I see the U.S. district attorney for South Carolina is here, Mr. Henry McMasters. We are pleased to have you attend the hearing.

Mr. **McMasters**. Thank you, sir.

The **Chairman**. I have been told we have to have two more lawyers in the drug enforcement program in South Carolina. I just talked to Mr. McMasters about this subject and asked his opinion. He said he highly endorses that request so you don't leave here today until I can see you.

Mrs. Dinkins, you are presently a partner in the law firm of Vinson & Elkins?

TESTIMONY OF CAROL E. DINKINS, NOMINEE, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mrs. **Dinkins**. Yes, sir.

The **Chairman**. Prior to joining the Department of Justice, you served as Assistant Attorney General.

Mrs. **Dinkins**. Yes, I did.

The **Chairman**. Would you please tell the committee the arrangement you have made to resolve your financial interest in this firm.

Mrs. **Dinkins**. I have advised the firm I will resign my partnership upon confirmation by the Senate, and I will have no other continuing interest in the law firm.

The **Chairman**. In other words, you are severing your connections.

Mrs. **Dinkins**. Yes.

The **Chairman**. Do you anticipate cases coming before the Department of Justice in which you or your firm might have been involved and, if so, what action to do you intend to take in such cases?

Mrs. **Dinkins**. There may indeed be cases or future cases before the Department that my former firm is involved in. If that is the case, I will by directive instruct the Department that I am not to be involved in but to be recused from all such cases or matters.

The **Chairman**. I believe your husband is also a lawyer and he is in another law firm out there, I think you told me yesterday.

Mrs. **Dinkins**. Yes, sir, and I will be recused from all cases and matters in which his firm is involved that come before the Department. I have filed a recusal letter with the committee.

The **Chairman**. I wanted to bring that point out because I think it is important because, where you have such a close relationship as husband and wife, I think that is the only appropriate step you you can take, and I want to commend you for doing that.

Mrs. Dinkins, what do you consider to be the major problems facing you at the Department of Justice if you are confirmed a Deputy Attorney General?

Mrs. **Dinkins**. The things I am concerned about are matters pending before the Congress such as the crime package and immigration bill. It is my intent to do anything I can to work with this committee and with the House Judiciary Committee to make sure we get those things approved.

The **Chairman**. Mrs. Dinkins, what are your major goals and priorities and what actions, if any, have you taken to accomplish these tasks?

Mrs. **Dinkins**. My major goals in the Department are to get the crime package and the immigration bill passed. I have advised Mr.

McConnell and other members of the Department that I am available to work in any way that would be appropriate and helpful to assure passage of that legislation.

I also want to continue the system of coordination department-wide that was commenced under this administration to make sure the U.S. attorneys and local law enforcement officials are involved in setting priorities and in carrying out those priorities in law enforcement matters.

The CHAIRMAN. There is one here today from South Carolina. You may want to talk to him before you leave.

Mrs. DINKINS. I will be sure to do that.

The CHAIRMAN. I realize as Deputy Attorney General, you will be responsible for all civil actions at the Department of Justice. I wonder, however, if you have any specific thoughts on what actions might be taken by the Department to curtail the activities of individuals involved in organized crime?

Mrs. DINKINS. This is an area that is very important and it is one the administration has worked very hard to move forward on. The budget in the Department has been extended considerably, particularly to deal with organized crime. I support that effort and I will work to make sure that we train people and get them into the field in this area as quickly and as effectively as possible.

The CHAIRMAN. I don't know of anything today that is more important than taking steps to curtail organized crime and drug activities.

Do you feel enough resources have been allocated for these areas?

Mrs. DINKINS. I think the Department has taken steps to make sure sufficient resources in this area are available to the Department, and I certainly support that sort of work in the budget area and in the area of resources.

The CHAIRMAN. The chairman of the President's Commission on Organized Crime was before the Judiciary Committee this morning, Judge Kaufman from New York. We think this Commission is very important. It has tasks to be performed and he has been of great service to his country. I plan to hold at least one organized crime hearing in my own State concerning motorcycle gangs. I don't know if you have had an opportunity to study or learn about some of their activities.

Mrs. DINKINS. No, sir, I have not studied it but I have read a little about it and I know it is a serious problem.

The CHAIRMAN. Mrs. Dinkins, in 1982 you presented a paper to the American Bar Association's Hazardous Waste Workshop on enforcement litigation. What do you see as the problems confronting the Department of Justice in being more actively involved in the investigation and prosecution of those responsible for hazardous waste violations, and how would you resolve such problems?

Mrs. DINKINS. At the time I delivered that speech, we were working in a concentrated way to try to deal with criminal activities in the hazardous waste area. After giving that speech, we sought additional resources, and we organized an environmental crimes unit within the Land and Natural Resources Division. We staffed it with experienced prosecutors. Since that time, the EPA has added some experienced investigators, about two dozen of them, and there has been considerable training of those investigators since that time.

I think both the Department and the EPA have worked very hard to try to improve the ability to deal with hazardous waste crimes, and I feel that is moving along very well.

The CHAIRMAN. I recently addressed a meeting of the members of our Regional Crime Information Center at their winter conference in Nashville, TN. I was extremely impressed with the hard-working indication displayed by these fine law enforcement officers. ROCIC is one of the six multistate regional intelligence projects. These organizations do an outstanding job, in my opinion, in coordinating and providing information to local law enforcement officers that is usually not available from the Federal level.

Mrs. Dinkins, my question is actually in two parts. First, do you support the activities of these multistate projects and, second, would you be willing to meet with their directors in order to obtain input and get first-hand information in resolving the problems of mutual concern?

Mrs. DINKINS. Senator, I would be very pleased to meet with them and, indeed, I would be pleased to meet with you about the programs. It is something I am not familiar with but I would like to learn about it.

The CHAIRMAN. Mrs. Dinkins, I recently learned as a result of the exchange of information that occurred at the ROCIC conference, seven murders were solved at just one conference. Two of these involved law enforcement officers. One was a 6-year-old unsolved murder of a deputy sheriff. Additionally, others have been identified in other unsolved murders. Incidentally, at that conference, I saw a film of a man Lukas and a Mr. O'Tool who have been arrested and charged with many crimes. I understood that at that time that they had evidence that maybe he had confessed to 87 crimes. He confessed to 87 murders, and this center down there was very essential and important in uncovering a lot of these crimes. I came away from that center feeling that they are really doing a magnificent job, and that is why I would appreciate your meeting with them.

Mrs. DINKINS. I will look forward to it.

The CHAIRMAN. Traditionally, the Deputy Attorney General has been responsible for oversight of the day-to-day operations in the Justice Department. Do you know whether that will continue to be duties of the Deputy Attorney General or have you talked to the Attorney General and does he have other matters in mind for you?

Mrs. DINKINS. We have not talked specifically about the duties. It is my understanding they will be the same as you have seen in the past in this administration, but I will be available to do whatever the Attorney General needs me to do.

The CHAIRMAN. I think those are all the questions I have in mind at this time.

Senator Denton has some questions here. If you will respond to those for the record, I would appreciate it. I will get the staff director to hand those to you.

I understand Senator Biden is on his way down here.

We will take a 5-minute recess until he arrives.

[Brief recess.]

The CHAIRMAN. The committee will come to order.

The distinguished ranking minority member of this committee is now present, Senator Biden. He and I work very closely together. The cloakroom is in the majority now and he cooperates with me, and if the Democrats ever get a majority, which I hope they won't, I will cooperate with him.

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator BIDEN. Thank you, Mr. Chairman. If that ever happens, Mr. Chairman, I can assure you if that day ever arrives, I will look forward to your cooperation.

Mr. Chairman, I apologize for being late. I have a series of questions. I will not ask that all of them be answered at this time; but with your permission and for the record, I would like to submit to the nominee six questions relating to personal finances for the record.

The CHAIRMAN. Without objection, that will be done. Will you answer those for the record.

Mrs. DINKINS. Yes, Mr. Chairman.

Senator BIDEN. I have a whole series of questions which I will not tie you up on now but they are questions about which we should have some insight into your notions of how we should be conducting certain portions of our endeavors in the Justice Department from fair housing to Grove City and others which I will not again tie you up with now, but I would like for the record prior to our voting on your confirmation which I expect will come very rapidly, but let me begin with a few questions relating to the management of the Department of Justice. For the past 5 months, top-appointed positions in the Department of Justice have been in a state of flux and some might even suggest there has been some mild confusion. The Attorney General announced he intends to resign in January. As a result of inquiry, he acceded to the request of the President to remain although he is less than enthusiastic about remaining until after the November election, and quite possibly we will have the matter resolved by then.

When Deputy Attorney General Schmults resigns and vacancies exist in the Civil Division and the Office of Legal Policy, all of this brings me to the question of who is going to be running the Justice Department?

You are being appointed to a very significant position. The significance increases in light of the circumstances in which you are going into the Department. Have you had any extended conversations with the Attorney General of the United States about your decision to accept the nomination of the deputy position?

Mrs. DINKINS. Yes, Senator Biden, I have.

Senator BIDEN. What do you understand the Attorney General's intentions regarding his tenure in the Justice Department?

Mrs. DINKINS. The Attorney General advised me he would stay until the end of the year or until sometime next year when his successor is confirmed.

Senator BIDEN. Obviously, I am not being facetious in asking the question because this could be a de facto hearing for you to become

Attorney General of the United States if he chose not to stay on, which would be his right not to stay on.

It is certainly a possibility that the allegations against Mr. Meese would be extended beyond the time the Congress plans to stay in session. I sincerely hope that will not be the case. In that event, the nomination of another individual would have to be carried over to the 99th Congress.

You are quite sure Mr. Schmults, based on your discussions with him, would remain until a successor was chosen or until after the next election; is that correct?

Mrs. DINKINS. Yes, Senator Biden. I can't tie Mr. Smith down for him but I did discuss it with him and that is certainly my understanding.

Senator BIDEN. Obviously, the reason for this is not just an idle exercise as to what Mr. Smith is thinking today or will Mr. Smith stay in Washington. As qualified as you may be, I consider it to be a very, very important decision, as we all do, as to your appointment to this position.

Quite frankly, I think you have had an admirable record in the area of environmental policy, and I think you have demonstrated some fine judgmental qualities. Having been in a tough spot—and you may not want to acknowledge you were in a tough spot—I think you were in a tough spot but you don't have a lot of experience beyond that area of law.

Can you tell us why you think you are qualified for this number two slot and tell us in what areas you will function, and what will be your responsibilities in a Smith-run Attorney General's Office.

Mrs. DINKINS. I think the experience I have had lends itself very well to the position of Deputy Attorney General. I think it is true in this instance. I know all of the people in the Department. I have worked with them. I worked very successfully with them. I know many Members of Congress, and I have testified numerous times before Congress in my previous tenure. I also know many of the people in the agencies. I think because I know these people, because I have worked successfully with them, because I have been working in the Government in the recent past and know how it operates and know what to look for and I know what to be concerned about that I can fulfill this position very well.

Senator BIDEN. Do you feel qualified to make judgments on antitrust law, for example? It is an area of some considerable flux right now, I think for good reasons. Is that an area you would feel you had the expertise to be making judgment calls about at this point?

Mrs. DINKINS. I do not hold myself out as an antitrust expert but I hold myself out as a lawyer who can make tough decisions. I do that after I have weighed all sides of the question. I would do it only after seeking the advice of the people who are expert in this area and then consulting with other people who may not be expert but who have sound judgment and can give me sound advice on these issues. I will be very cautious in making decisions, but I think I am capable of doing it.

Senator BIDEN. Just this week, the Associate Attorney General Mr. Jensen presented the Department's fiscal year 1985 budget. I think this was a valuable opportunity for him to present his past accomplishments and future direction of the Department. It is essential that there be the balance of power between the executive branch and the legislative branch.

I have reviewed the presentation made by Mr. Jensen and I have concerns I would like to discuss with you.

Although your nomination was only received by the Senate on Friday, let ask were you involved in the discussions and/or consultations with Mr. Smith and Mr. Jensen and Mr. Meese or anyone else with regard to the Department's budget submission?

Mrs. **DINKINS**. No, I was not.

Senator **BIDEN**. What would be your view as to the immediate requirement that will come upon you if in fact you are confirmed by this committee and by the Senate in the next several weeks? How deeply do you plan to get involved in the authorization process and the funding questions?

Mrs. **DINKINS**. I will get involved in any of those questions that call for my involvement. If it is still pending before the committee, once I have been confirmed, if I am confirmed, and there are outstanding questions by the committee, I will certainly be involved in discussing those. If there is anything that the committee would like to know about my views once I have studied the budget requests, certainly I would be happy to discuss that with you.

Senator **BIDEN**. I happen to have been a real fan of the man whose job you would be filling. I found him to be always available, extremely bright, and he impressed me with the range of knowledge he had on some of the very diverse subject requirements that he had to deal with and you will have to deal with.

One of the things that concerned me a little bit about the Associate Attorney General's presentation to this committee was that there was absolutely no mention made of the activities of the Civil Rights Division or the Antitrust Division. Certainly Members of Congress and others view activities in those two areas the fundamental protection of both civil rights and economic rights. I am extremely discouraged that the enforcement of civil rights or antitrust laws, as it appears to my perception, with your predecessor gone, seem to have a much lower profile in enforcement in those two areas.

Could you assure the committee that both those areas would receive your immediate attention? I am not asking you how you would come out on it but that you, in fact, view enforcement of the civil rights legislation and antitrust legislation on the books as a very important function and part of your job, Mrs. Dinkins.

Mrs. **DINKINS**. I can assure you of that very easily. I am very committed to law enforcement, and I don't think any area should be overlooked, and I would not overlook the civil rights area or antitrust area.

Senator **BIDEN**. I am very pleased with the interest of this administration, through the prodding of and the support of the chairman here, to deal with law enforcement, enforcing the laws. But I am a little concerned that we tend to think of enforcing the laws in a somewhat myopic sense. We think of it in terms of the criminal law as it relates to law enforcement, which I am delighted about, but we do not seem to see a similar emphasis placed upon enforcing civil rights laws.

Are you prepared to tell us that that is an equally high priority for you as the number two person in the Justice Department?

Mrs. DINKINS. Yes, sir. I believe the laws whether criminal or civil laws should be enforced, and I would certainly not overlook the enforcement of the civil rights laws.

Senator BIDEN. Have you had an opportunity to look at the decision in the *Groves College* case?

Mrs. DINKINS. I have not looked at that decision.

Senator BIDEN. I will not attempt to pin you down on that now, but it will be one of the very important areas we will have to deal with. There may be disagreement on the committee whether we should take certain issues. They have already been taken. How they will come out is another question.

When Mr. Schmults was there, we were always able to get an answer one way or the other. We did not always like the answer. Many of us are going to be looking to you because you will, in fact, be the de facto person running the Justice Department. We don't have the opportunity to have the Attorney General available to us every time we would like him.

In fairness to the Attorney General, I found in my limited experience—I have only been here for 12 years and four Presidents and the Chairman is much more experienced than I am—but I suspect you have found this in other departments or portions of other departments you have run and in your legal practice that when an associate lawyer and/or employee decides it is time to go, although you may be able to talk him into staying on, the fact is you do not have the same person you had as the person who made the decision they were going. It is human nature. I have never seen it function any different way. So we are going to be looking to you a lot, so I would be very interested in receiving a commitment from you that you will be willing to come back up and discuss with us the Department's position at an appropriate time once you have been involved on the *Grove City* case and other matters relating to civil rights enforcements.

Would you be willing to do that?

Mrs. DINKINS. First, let me say I think Attorney General Smith is very active in the Department. I see no indication that he is not playing the full role he has always played. I certainly intend to make myself available, as Mr. Schmults always was, in dealing with Congress or anyone else and I will look forward to being able to discuss this and other issues in which you have some interest or concern.

Senator BIDEN. You I will cease with this, Mr. Chairman, because I could go on for a long time. I will submit most of my questions in writing.

I see from your biography you were Chairman of the President's Task Force for Legal Equity for Women from 1981 to 1983. Could you share with us what you believe are the most important accomplishments of that task force?

Mrs. DINKINS. The task force was part of the overall legal equity project. It was not a task force given the assignment to write reports or to conduct investigations. It had a more limited function than that. The Civil Rights Division at the Department of Justice was charged with examining the Federal statutes and Federal regulations to determine whether there was any discrimination on the basis of gender. Once the Civil Rights Division identified any of those types of discrimination, it sent that identification forward to the Cabinet Council on Legal Policy.

Matters that dealt with regulations from that point, once the Cabinet Council decided that they were appropriate for the administration to work on, were to be forwarded to the task force so that we could assure that the individual agencies that would need to change regulations would do so and that that would be done expeditiously and in accordance with what was pointed out to be the problem. That process was not completed by the time I resigned from that chairmanship.

The statutes were identified, and I believe what was identified in that report plus an additional 40 or 50 have been sent to the Hill and are part of Senator Dole's bill, as I recall, and that is pending before the Congress now. By the time I left, the efforts in the regulatory area were much larger and, as I understood it, Civil Rights was not finished and those regulations had not come before the task force

Senator BIDEN. I think it is a really very important area. I don't think we are committed enough downtown or uptown to deal with the issues but, again, I will not belabor the point now with you.

I just look forward to having an opportunity after reading the response to the questions that I will submit, subsequent to your confirmation which I expect will be forthcoming, to be able to discuss in an open-minded way some of these concerns.

The only thing I ask of you is, if you would, in turn, once confirmed be open-minded the other way, too. Let us know what is on your mind. Talk to us. All we Democrats are not all bad. Really and truly, I think Mr. McConnell and others will tell you that the more we talk, the more we get accomplished, and there is a tendency not to do that up here sometimes.

I think you have one serious liability and that is you are exactly 3 years younger than I am and much to young to be in such an important position in the Justice Department. Once I told my constituents when that became an issue in my campaign, I will overcome that disability. I welcome the nomination and look forward to receiving your responses and, if confirmed, working closely with you. You have a big job ahead not with standing your confidence. The Attorney General was active in the early days. I think he is a fine fellow. I think you will find you will have more responsibility, possibly more authority and a greater obligation than most persons have had in the No. 2 slot. If you are confirmed, I wish you well in that endeavor and I thank you, Mr. Chairman.

The CHAIRMAN. I might say that her good looks will overcome the youth question.

Mrs. DINKINS. Thank you, Mr. Chairman.

The CHAIRMAN. I am sure you will be glad to come up and talk to Senator Biden any time he wants you to. He is a very persuasive man. Just hold your ground, hold your ground, stick to your convictions. He is fair, and whether he agrees with you or not, I am sure you will get along fine.

If there are no further questions, the committee stands adjourned.

[The committee was adjourned at 2:50 p.m., to reconvene subject to the call of the Chair.]

BIOGRAPHY

CAROL E. DINKINS

NOMINEE, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Birth: November 9, 1945, Corpus Christi, TX.

Legal residence: Texas.

Marital status: Married to O. Theodore Dinkins, Jr., two children.

Education: 1964-1969—Universerity of Texas, B.S. degree (1968); 1969-1971—University of Houston, J.D. degree.

Bar: 1971—Texas.

Experience: 1971-1973—Associate Professor, University of Houston; 1973-1981—Vinson & Elkins; 1981-1983—Assistant Attorney General, Land & Natural Resources Division, Department of Justice; July 83 to present—Vinson & Elkins,

CONFIRMATION HEARING ON PAUL G. ROSENBLATT

WEDNESDAY, MAY 23, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to call, at 1:35 p.m., in room SD-226 of the Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order. We are met today to hold a hearing on Paul G. Rosenblatt of Arizona to be U.S. district judge for the district of Arizona.

We have Senator DeConcini here, and before we swear the witness and question him, Senator DeConcini, I know how busy you are—he's a very important man around this capital—and I don't want to detain you, so we will be glad to hear from you now.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DeConcini. Mr. Chairman, thank you very much. You are kind to make reference to my importance. We are privileged to have the chairman of the Judiciary Committee here today. I join with Senator Goldwater in urging the committee's swift approval of Paul G. Rosenblatt for district judge for the District of Arizona.

We have an opportunity in the closing days of this congressional session, to do something very important. That is to bring the Federal district court in Arizona to its full capacity. We are one of the fastest growing States and have a calendar that is extremely burdened, therefore the need is there.

Senator Goldwater's recommendation and the President's choice of Mr. Rosenblatt is excellent. We couldn't find a better candidate for this position. He has the necessary temperament and the background; he has the experience, having served as a superior court judge, and he has experience knowing the problems that Congress goes through, having served as administrative assistant to Representative Sam Steiger some years ago.

It is a real pleasure, Mr. Chairman, not only to introduce to you P.G. Rosenblatt as the judicial nominee, but also as a fellow classmate in law school. He is someone with whom I have had professional relations, social relations, and in whom I have the greatest confidence that we will be enhancing the bench immensely in the years to come by his nomination.

The CHAIRMAN. Thank you very much, Senator. We appreciate your presence here, and I am sure your testimony will bear great weight with the committee and the entire Senate.

Senator DECONCINI. I will stay for just a minute while Mr. Rosenblatt testifies.

The CHAIRMAN. You may remain, if you wish, or, if you feel it necessary to leave, we will understand.

Senator DECONCINI. Thank you, Mr. Chairman.

The CHAIRMAN. Now, without objection, we will place a statement by Senator Goldwater in the record at this point. Senator Goldwater is tied up in both military construction, military authorizations and intelligence, and said he was sure you would understand, Judge Rosenblatt—but he gives you a fine recommendation.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR BARRY GOLDWATER

Mr. Chairman and members of the Judiciary Committee: This is one of those days that every one of us in the Senate runs into once in a long, long time, and I thank the lord there are not more of them.

At this moment, I am helping to mark-up the military authorization budget and, also, I am supposed to be doing the same job for the Intelligence Committee. These are probably two of the most important assignments I have this year and there is no way I could absent myself from either one.

It is a sad experience for me because I wanted to be with you in person today and introduce to you, Mr. Paul G. Rosenblatt. Paul has been a friend of mine all of his life and his family long before that. We both call Prescott, AZ, our family home and, because of this, I have had the opportunity to watch him as he developed from a young boy to manhood and into one of the most successful lawyers we have in the State of Arizona. He is above reproach as far as being a moral man is concerned and has one of the best minds I have ever known in the legal profession. Above all, he is respected by everyone in the State of Arizona both in and out of the legal profession. It has been my honor and pleasure to nominate and see confirmed quite a few Federal judges. But, there has never been one that I have known that I feel so close to or feel so proud of and, indeed, one that I feel so confident of about his future success.

Mr. Chairman, I've explained my situation to Paul and I am sure he understands it and I apologize to you and to the committee for not being here in person to present this young man who, I am sure, will become one of the outstanding members of the Federal judiciary.

TESTIMONY OF PAUL G. ROSENBLATT, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ARIZONA

The CHAIRMAN. Now, if you will stand up, judge, to be sworn.

[Judge Rosenblatt stands and raises his right hand.]

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge ROSENBLATT. I do.

The CHAIRMAN. Now, do you want to introduce your family and friends?

Judge ROSENBLATT. Yes, Mr. Chairman, I have my wife with me, Shannon Rosenblatt. We intended to have some friends here, but, unfortunately, they weren't able to get here. We do have my friends Judy Eisenhower and Terry Emerson of Senator Goldwater's staff

The **Chairman**. We have a few questions. Incidentally, I congratulate you on having such an intelligent and charming wife.

Judge **Rosenblatt**. Thank you, Mr. Chairman.

The **Chairman**. Judge Rosenblatt, you have served on the superior court of the State of Arizona for the county of Yavapai—is that how you pronounce it?

Judge **Rosenblatt**. Yes, sir.

The **Chairman**. It's an Indian name, I presume. Since 1973, this, I believe, is an Arizona court of original jurisdiction.

Is that similar to the court I was judge on once, a circuit court, the highest trial court in the State?

Judge **Rosenblatt**. Yes, sir, it is.

The **Chairman**. Judge, I am confident you are very knowledgeable of State laws, because of your experience. I wonder if you foresee any difficulty in the transition from the State court to the Federal district court?

Judge **Rosenblatt**. Mr. Chairman, I think the day-by-day aspect of being a Federal district judge will be as comfortable as putting on an old glove. I have certainly been exposed to everything that takes place in a courtroom. Obviously there will be a great amount of attention that will have to be paid to particularly jurisdictional questions, the application of Federal law—such things as that.

But I see no serious difficulty in making the transition.

The **Chairman**. Judge, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

Judge **Rosenblatt**. This is a delicate area, Mr. Chairman. First of all, we have to remember that every person is entitled to be represented by counsel of his choice, and so a judge must be very careful in intervening in cases where it may appear that counsel is unprepared or unqualified. I think, however, if the situation were serious enough that I would not hesitate to interrupt the proceedings to admonish counsel; and if the situation were even more serious than that, I would not hesitate to stop the proceedings and refer the lawyer to the State bar association.

The **Chairman**. Judge, the courts of today are facing a constant increase in their workload, and it appears that this trend will continue. I often bring this fact to the attention of judicial nominees and ask them if they are willing to work a little harder and put in a little more time in order to reduce this workload as much as possible.

Do you have any comments or recommendations that might assist in stabilizing or decreasing the workload of the courts? Are you willing to work a little harder yourself?

Judge **Rosenblatt**. There is no substitute for hard work, Mr. Chairman, and, insofar as the overall case load is concerned, I believe that this is not just a problem confronting the judiciary but must also be considered by the Congress as a part of its obligation under article III of the Constitution.

Clearly, a great many things can be done to lessen the court load in Federal district courts, and as a product incidentally of the State court system, I have confidence in that system, and I feel that perhaps more responsibility can be left to the State courts.

The CHAIRMAN. Judge, in response to a portion of the committee questionnaire concerning judicial activism, I believe you stated: "Aside from violating constitutional balances, the court is ill-equipped to carry out administrative functions, even as they may apply to the judiciary itself, much less when it tries to oversee other institutions' responsibilities."

I was glad to see that you take that position. We have, in my opinion, had too much judicial activism in this country. We have had some district judges who have taken over the running of school districts, even tried to impose taxes, we have had others who have taken over State institutions, hospitals, and schools in my State—and I imagine it's the same in other States—they feel that there is a big Federal arm on them all the time.

And we feel the States should be allowed to run their own institutions; the Federal Government should not intervene, unless it is some very extreme situation.

How do you feel about that?

Judge ROSENBLATT. I have no disagreement with that position.

The CHAIRMAN. I believe you also informed the committee that "I believe the judiciary, particularly the trial courts, should confine itself to grievance resolution. Problem solution is a legislative responsibility, the exercise of which will often be the basis of a grievance requiring court-ordered resolution."

Judge, where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Judge ROSENBLATT. Obviously we would have to first look to the Constitution of the United States and the various judiciary acts passed by Congress, together with all of the guidelines provided by the U.S. Supreme Court. I believe, in analyzing those provisions and placing those, together with the rare experience that I have had in working in all three branches of Government, the legislative judicial and executive, and at the county, State, and Federal levels, that I would be able to apply the tests so that the distinction could be made.

There is no firm line that shows where the separation of powers begins and ends. It is a matter of feel in a great many cases, but basically the legislative must work the will of the majority in the public interest. The judge must review, enforce, and interpret that law, if properly called upon.

The CHAIRMAN. I notice you were in the Army Reserve for 2 years. Are you still in the Army Reserve?

Judge ROSENBLATT. I'm sorry.

The CHAIRMAN. I observe that from 1951 to 1953 your biography shows you were in the Army Reserve. I am just wondering if you are still in the Army Reserve.

Judge ROSENBLATT. No, sir, I am not.

The CHAIRMAN. You have worked here on the Hill, I have noticed, too.

Judge ROSENBLATT. Yes, Mr. Chairman.

The CHAIRMAN. Five years, administrative assistant to Hon. Sam Steiger. So you are not unfamiliar with the Washington scene.

I don't think I have any other questions. Anything you wish to say in particular?

Judge **Rosenblatt**. Not at this time, Mr. Chairman.

The **Chairman**. I am just anxious to see us get judges who believe the Constitution says what it means and means what it says, and will restrict themselves to the responsibilities that we feel are theirs under the Constitution and not try to spread their power otherwise. Some people crave more power, which to me, as the good book says: "The greatest among you shall be your servant." And to me that indicates not trying to grasp more power, but to respect the rights of others and do unto others as you would have them do unto you. I have seen some Federal judges try to embarrass witnesses and jurors and attorneys, and I think it's completely unnecessary. And I have been shocked several times at the desire it almost seems to be a tyrant, because a Federal judge has almost unlimited power.

And I am sure that you will not be that kind, but that you will make a good judge. You are highly recommended by both Senators here, and we hope you enjoy your tenure on the bench.

Judge **Rosenblatt**. Thank you, Mr. Chairman.

Senator **DeConcini**. Thank you, Mr. Chairman.

The **Chairman**. We now stand adjourned.

[The committee adjourned at 1:47 p.m.]

BIOGRAPHY

PAUL G. ROSENBLATT

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF ARIZONA

Birth: April 4, 1928, Prescot, AZ.

Legal residence: Arizona.

Marital status: Married to Shannon Cookson Rosenblatt, 2 children.

Education: 1946-47—Seattle University; 1947-51—University of Washington; 1955-58—University of Arizona, B.A. degree in 1957; 1960-63—University of Arizona, J.D. degree.

Bar: 1963—Arizona.

Military service: 1951-53—U.S. Army Reserve.

Experience: 1963—Clerk to Judge George Sterling, Superior Court, Maricopa County; 1963-66—Assistant attorney general, State of Arizona; 1967-72—Administrative Assistant to Honorable Sam Steiger, U.S. House of Representatives; 1971-73—Private practice, Prescott, Arizona; 1973 to present—Judge, superior court, Yavapai County, State of Arizona.

CONFIRMATION HEARING ON:

JEAN GALLOWAY BISSELL, DOMINICK L. DiCARLO, JOHN M. DUHE, JR., AND TOM S. LEE

THURSDAY, JUNE 7, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 8:57 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Robert J. Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today to hold hearings on certain nominations. I believe the first is for U.S. circuit judge: Jean Galloway Bissell, of South Carolina, to be U.S. circuit judge for the Federal Circuit.

If you will come around, Ms. Bissell, you might hold up your hand and be sworn.

Will the testimony you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Ms. BISSELL. Yes.

The CHAIRMAN. I had the pleasure of recommending Ms. Bissell to the President in nomination to be a U.S. circuit judge for the Federal circuit. I am very pleased today to introduce to the Senate Judiciary Committee Ms. Bissell, who is here in person.

Ms. Bissell is a native of Due West, SC, and a graduate of the University of South Carolina and the University of South Carolina Law School. Ms. Bissell graduated magna cum laude from the University of South Carolina and was elected to Phi Beta Kappa.

While in law school, she served as the associate editor and business manager of the South Carolina Law Review, and was elected to Order of Wig and Robe. Ms. Bissell also graduated magna cum laude from law school.

Ms. Bissell began her law career in 1958 as an associate in the firm of Haynsworth, Perry, Bryant, Marion & Johnstone in Greenville, SC. In 1965 she became a partner in this law firm and served in that capacity for approximately 6 years.

In 1971 she became a partner in the law firm of McKay, Sherrill, Walker, Townsend & Wilkins. From 1976 until the present time, Ms. Bissell has been the general counsel for the South Carolina National Corp. and the South Carolina National Bank of Columbia. Incidentally, that is the largest chain bank in South Carolina.

During this period, she has also served as the senior vice president and executive vice president for the South Carolina National Corp. She presently serves in the capacity of vice chairman and chief administrative officer for this organization and has done so since 1981.

Ms. Bissell has participated in a number of legal and civic organizations. The following are but a few of those she has been involved in: Chairman and member of Corporate Counsel Committee, Economics of Practice Section of the American Bar Association; member of Corporate Counsel Committee, Corporation Banking and Tax Section, South Carolina Bar; chairman, Continuing Legal Education Committee of the South Carolina Bar; secretary and member, South Carolina Bar Commission on Continuing Lawyer Competence; fellow, American College of Tax Counsel; member, Greater Columbia Community Relations Council Board; member, South Carolina Public Service Commission Merit Selection Panel; vice president and regional director, American Library Trustees Association; chairman, Fine Arts Committee, Greater Greenville Chamber of Commerce; and secretary and treasurer, Columbia Estate Planning Council.

In addition to her work with these organizations, Ms. Bissell has found time to write such articles as, "Mergers, Consolidations, and Asset Sales" for the South Carolina Law Review; "A Fresh Look at Estate Planning in View of the Pension Reform Legislation" for the Journal of Taxation; and "Malpractice Insurance Coverage for Members of the Estate Planning Team" for the Eleventh Annual Institute of Estate Planning.

Ms. Bissell is well-known and respected for her sound legal judgment, as well as for her dedication to community and civic activities. She possesses the judicial temperament, integrity, and experience required of a nominee for the Federal circuit. I am most pleased she has been nominated for this position and it is my opinion that she will be an asset to the judicial system.

Ms. Bissell, we are very pleased to have you with us this morning.

At this time, without objection, I would like to place in the record a statement by the junior Senator of South Carolina, Senator Ernest Hollings, in behalf of Ms. Bissell. So, both Senators from South Carolina have endorsed her highly.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR ERNEST F. HOLLINGS

NOMINATION OF JEAN GALLOWAY BISSELL TO THE U.S. CIRCUIT COURT FOR THE FEDERAL CIRCUIT

Mr. Chairman and members of the committee, it is a pleasure that I have this opportunity to join with the distinguished Chairman to introduce a very distinguished attorney and outstanding citizen of South Carolina, Jean Galloway Bissell. She has been nominated by President Reagan to be United States Circuit Court Judge for the Federal Circuit. Not only is Jean the first South Carolinian appointed to this Court, Mr. Chairman, she is, to my knowledge, the first woman South Carolinian appointed to any Federal Court.

Before I comment on Jean's record, accomplishments, and dedication to and involvement in civic affairs, let me take a minute or two to comment on someone who would be very proud to witness this occasion today, her father the late Bob Galloway. When I first began my career in elected office thirty-five years ago as a member of the South Carolina House of Representatives Bob and I were deskmates. Good fortune certainly smiled on me. Bob Galloway was one of the finest public servants I have ever had the opportunity to serve with. He was particularly helpful to this young lawyer serving in his first term and he was respected by all for his sound judgment. Mr. Chairman, his daughter, Jean Galloway Bissell, has inherited these outstanding qualities exemplified by her father and has, in her own right, earned the respect and admiration of South Carolinians from all walks of life. I share the pride I know her father, and my friend, would display, and I urge that the Committee give prompt approval of her nomination so that the Senate can confirm her appointment without delay.

We in South Carolina are very pleased with this prospective addition to the Federal bench. Jean Bissell follows the very high traditions of excellence our Federal Judiciary exemplifies and to which we in South Carolina have become routinely accustomed. I share the confidence of many South Carolinians that Jean Galloway Bissell will similarly distinguish herself.

The Chairman will have detailed comments to make about Jean's record and credential for this high office. I will not be lengthy in my remarks, but I do wish to take a few minutes to introduce her and outline why she's most qualified for this appointment.

Jean Galloway Bissell was born in Due West, South Carolina on June 9, 1936. Since Saturday is her birthday let me take this opportunity to wish her an early Happy Birthday. She attended Erskine College in her hometown and graduated from the University of South Carolina with a B.S. degree in 1956 and from the University's Law School in 1958. Both of her degrees were awarded magna cum laude. As a law student she was an editor of the law review and Chief Justice of the Order of Wig and Robe which distinguishes her as the number one student in her graduating class. She has practiced with distinguished law firms in Greenville and Columbia and was a partner in both. Beginning in 1976 she has been associated with the South Carolina National Corporation and the South Carolina National Bank in various executive capacities from General Counsel, to Senior Vice President, to Executive Vice President, to Vice Chairman and Chief Administrative Officer, to Director, the position in which she currently serves.

She has involved herself in the activities of all bar associations from the national to the local level. She has been very active in the American Bar Association and served as Chairman and Member of the Corporate Counsel Committee, Economics of Practice Section, to name one activity. She was Chairman of the Continuing Legal Education Committee of the South Carolina Bar. She has served as a Presidential Appointee to the U.S. Circuit Judge Nominating Commission. These are only a few of the professional memberships and activities in which she has participated. The long list contained in her biographical information will give you the full range of her many activities. It's most impressive.

Aside from career and professional activities, Jean has found time to contribute heavily to civic and charitable and community affairs. She has served on numerous Advisory Councils—South Carolina State Library, Erskine College, Columbia College, Furman University and the University of South Carolina. She has been a member of many Boards. Their diversity is indicative of her ability and the respect others have for her talents: Columbia Philharmonic Orchestra; Greater Columbia Community Relations Council; South Carolina Chamber of Commerce; Leadership South Carolina; and, South Carolina State Library Board. The list of Trusteeships and Presidencies is equally impressive. Again I have been selective and you can refer to her biographical information for a complete listing. The point I make is that Jean has been a strong and capable participant in the affairs of her community and her numerous activities reflect the tireless and unselfish nature that those of us who know her find so characteristic. Finally, Jean is married to Gregg C. Bissell. He was a long-time employee of the South Carolina State Tax Commission. He has supported her efforts and has joined her in many of her activities.

Mr. Chairman and members of the committee, let me close my remarks by saving that Jean Galloway Bissell has demonstrated those traits of character, intelligence, professional capacity and scholarship, community involvement and leadership that make her most qualified for appointment to the Court of Appeals for the Federal Circuit. I am confident, as I said, that she will fulfill this responsibility in a most capable manner.

Mr. Chairman, I ask that her biographical information be included with my remarks.

BIOGRAPHICAL INFORMATION

1. Full name (include any former names used). Jean Galloway Bissell, Maiden Name: Jean A. Galloway.

2. Address: List current place of residence and office address(es).

Residence: 3102 Keenan Drive, Columbia, S.C. 29201.

Vacation Residence: No. 71 S. Lakeshore Drive, Lake Summit, P.O. Box 401, Tuxedo, N.C. 28784.

Office: South Carolina National Corporation, 1426 Main Street, Columbia, S.C. 29226.

3. Date and place of birth. Due West, S.C., June 9, 1936.

4. Marital status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Spouse, Gregg C. Bissell, has been retired for more than 5 years. Prior thereto, he was for over 20 years an employee of the South Carolina State Tax Commission.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Erskine College, Due West, South Carolina, 1952–54 (Transferred to University of South Carolina).

University of South Carolina, Columbia, South Carolina, 1954–1955.

Awarded Bachelor of Science degree in June, 1956, magna cum laude; University of South Carolina School of Law Columbia, South Carolina, 1955–58. Awarded L.L.B. in 1958, magna cum laude.

6. List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor or employee since graduation from college.

July 7, 1958 to April 30, 1965; Associate, Haynsworth, Perry, Bryant, Marion & Johnstone, Post Office Box 2048, Greenville, South Carolina 29602.

May 1, 1965 to November 30, 1971, Partner, Haynsworth, Perry, Bryant, Marion & Johnstone, Post Office Box 2048, Greenville, South Carolina 29602.

December 1, 1971 to January 31, 1976; Partner, McKay, Sherrill, Walker, Townsend & Wilkins (now Lumkin & Sherrill), Post Office Box 447, Columbia, South Carolina 29202.

February 1, 1976 to present; General Counsel, South Carolina National Corporation and the South Carolina National Bank, 1426 Main Street, Columbia, South Carolina 29226.

February 1, 1976 to December 15, 1980; Senior Vice President, South Carolina National Corporation.

December 15, 1980 to November 16, 1981; Executive Vice President, South Carolina National Corporation.

November 16, 1981 to present; Vice Chairman and Chief Administrative Officer, South Carolina National Corporation.

April, 1982 to present; Director, South Carolina National Corporation.

1971 to 1983; Shareholder/Officer, State Title Insurance Company.

1971 to present; General Partner, First Richland Investors.

1971 to present; General Partner, Bombay Pipe Dreams Land Company.

7. Military Service: Have you had any military service: If so, give particulars, including the dates branch of service, rank or rate, serial number and type of discharge received. No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

University of South Carolina, magna cum laude graduate. Elected to Phi Beta Kappa.

University of South Carolina School of Law, magna cum laude graduate. Associate Editor and Business Manager of South Carolina Law Review (1957–1958). Elected to Order of Wig and Robe (honor society) (Chief Justice, 1958).

Converse College: Awarded L.L.D. in 1976. Award for Distinguished Service, South Carolina Library Association (1973). First Annual Friend of Libraries Award, South Carolina Library Association (1976). Who's Who in America.

9. Bar Associations: List all bar associations, legal or judicial related committees or conference of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member of American Bar Association.

Member of South Carolina Bar.

Member of Richland County Bar Association.

Member of Committee on Corporate Law Department Forums, Section of Corporation, Banking and Business Law of the American Bar Association (1981).

Chairman and Member of Corporate Counsel Committee, Economics of Practice Section of the American Bar Association (1981).

Member of Corporate Counsel Committee, Corporation Banking and Tax Section, South Carolina Bar.

Member of The South Carolina Bar Law School Board, 1979.

Member Southern Bank House Counsel Group.

Member University of South Carolina Law School. Dean Search and Screen Advisory Committee (1979-80).

Chairman, Continuing Legal Education Committee of the South Carolina Bar (1970-76).

Secretary and Member, South Carolina Bar Commission on Continuing Lawyer Competence (1979-82) (South Carolina Supreme Court Appointment).

Member Fourth Circuit Panel—U.S. Circuit Judge. Nominating Commission (First Appointment 1977; Second Appointment 1978) (Presidential Appointment).

Fellow, American College of Tax Counsel.

Member, South Carolina Attorney General's Advisory Committee on Associate Counsel (1983-84).

Member, U.S. District Court for the District of South Carolina Nominating Committee for Federal Magistrate (1984).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong, (such as civic, educational, "public interest" law, etc.) which you feel should be considered in connection with your nomination.

Member of the following Advisory Councils:

South Carolina State Library (1971-76); Erskine College (1971-74); Columbia College (1974-78); Furman University (1972-); University of South Carolina President's National Advisory Council (1981-).

Member, Columbia Philharmonic Orchestra Board (1975-78).

Member, Greater Columbia Community Relations Council Board (1976-79).

Member, South Carolina Chamber of Commerce Board (1976-78 and 1980-).

Member, Board of Regents of Leadership South Carolina 1979-81).

Member, South Carolina Public Service Commission Merit Selection Panel (1980-) (Governor of South Carolina Appointment).

Member, South Carolina State Library Board (1981-86).

Member, South Carolina Council on Economic Education Board (1984-87).

Trustee, General Synod of the Associate Reformed Presbyterian Church (1960-70).

Trustee, Greenville County Public Library (1961-71).

Trustee, The Daniel Foundation (1968-).

Trustee, Richland County Public Library (1973-78).

Trustee, Women's Symphony Endowment Fund (1975-78).

Trustee, North Carolina Outward Bound School (1976-81).

Trustee, South Carolina Foundation of Independent Colleges (1979-83).

Trustee, Heathwood Hall Episcopal School (1979-81).

Trustee, Governor's Mansion Foundation (1980-).

Trustee, Providence Hospital Foundation (1982-85).

President, Greenville Estate Planning Council.

Chairman, Trustee Section of South Carolina Library Association (1966-67).

Vice President and Regional Director, American Library Trustees Association (1965-66).

Chairman, First Governor's Conference on Public Libraries.

Chairman, Fine Arts Committee, Greater Greenville Chamber of Commerce.

Treasurer, Richland County Public Library (1974-75).

Chairman, Richland County Public Library (1975-78).

Treasurer, Columbia Estate Planning Council (1975-76).

Secretary, Columbia Estate Planning Council (1976-77).

Vice President, Columbia Estate Planning Council (1977-78).

President, Columbia Estate Planning Council (1978-79).

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

South Carolina Surpeme Court—July 22, 1958.

U.S. District Court for the Eastern District of South Carolina—July 23, 1958.

U.S. District Court for the Western District of South Carolina—July 22, 1958.

12. Published Writings: List the titles, publishers and dates of books, articles, reports, or other published material you have written. You may also list any significant speeches which you feel may be of interest to this Committee.

Johnstone, Thomas K., Jr. and Jean A. Galloway, "Mergers, Consolidations, and Asset Sales," *South Carolina Law Review,* Vol. 15, 1963, pp. 415-434.

Bissell, Jean G., "A fresh look at estate planning in view of the pension reform legislation," *The Journal of Taxation,* January, 1975, pp. 47-49.

Bissell, Jean Galloway, "Malpractice Insurance Coverage for Members of the Estate Planning Team," *The Eleventh Annual Institute on Estate Planning,* The University of Miami, 1977.

Bissell, Jean Galloway, "The Shoemaker's Children Have No Shoes," *The Alabama Lawyer,* Vol. 42, No. 4, October, 1981, pp. 618-630.

Bissell, Jean Galloway, "ERISA's Impact on Estate Planning," *Pension and Profit-Sharing Tax Journal,* pp. 224-227.

Bissell, Jean Galloway, "Expansion of the Financial Industry Clones," Presentation to South Carolina Bar, Corporation, Banking and Tax Section.

Bissell, Jean Galloway, "Tax Advantages of Temporary Trusts," Presentation at Seminar Held by Estate Planning Councils of South Carolina.

Bissell, Jean Galloway, "Corporate Fiduciary Pitfalls and Perils," Presentation to Trust Section of Tennessee Bankers Association.

13. Health: What is the present state of your health? List the date of your last physical examination. Good, May, 1984.

Judicial Office (if applicable): State (chronologically any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court. N/A.

15. State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office. None.

The CHAIRMAN. Ms. Bissell, you have some members of your family here. Would you like for them to stand and introduce them?

TESTIMONY OF JEAN GALLOWAY BISSELL, NOMINEE, CIRCUIT JUDGE, FEDERAL CIRCUIT

Ms. BISSELL. Thank you.

Senator, my husband, Greg Bissell, is here and I would like for him to stand, please.

[Mr. Bissell stood.]

The CHAIRMAN. We are very pleased to have you with us, Mr. Bissell.

Any other family members or friends you want to introduce?

Ms. BISSELL. No, sir.

The CHAIRMAN. Ms. Bissell, the Court of Appeals for the Federal Circuit is responsible for hearing patent appeals from all Federal district courts. It will hear appeals in suits against the Government for damages or refunds of Federal taxes, appeals from the Court of International Trade, appeals from the Patent and Trademark Office, and other such agency review cases.

This court, needless to say, is an extremely busy and important one. The workload is great and there are only 12 judges to hear cases. Now, what actions will you take as a judge to ensure that the court is current, yet the required quality of appropriate judicial review is maintained?

In other words, they have got a heavy load and they have only 12 judges to carry it.

Ms. BISSELL. Senator, you do that by working until the backlog is reduced. I think in my history of 25 years in the practice of law and working, I have never had more than 2 weeks' vacation in any 1 year, and in the last 18 months I have not had a day of vacation due to the fact that a job needed to be done and I am willing to do it.

In addition to this, my husband says I am a workaholic.

The CHAIRMAN. I think you are kind of known as a workhorse anyway, are you not?

Ms. BISSELL. Yes, sir.

The CHAIRMAN. That is your reputation, so you do not mind working and you are willing to work hard to try to clear up this docket?

Ms. BISSELL. Yes, sir; I certainly am.

The CHAIRMAN. Ms. Bissell, since 1976 you have been general counsel for the South Carolina National Corp. and the South Carolina National Bank. I believe that is the biggest chain bank in South Carolina, is it not?

Ms. BISSELL. Yes, sir; it is.

The CHAIRMAN. I understand they are merging now with another chain bank in the State, which will make them one of the largest banks in the South, is that correct?

Ms. BISSELL. That is correct.

The CHAIRMAN. You handle the legal business for the bank, I believe.

Ms. BISSELL. Yes, sir.

The CHAIRMAN. At present you also serve as the vice chairman and chief administrative officer for the South Carolina National Corp. Now, Ms. Bissell, how has this experience and background prepared you for the position of circuit judge for the Federal Circuit?

Ms. BISSELL. As chief legal officer for a multibillion dollar corporation, I have had sole, final responsibility for the legal matters, including litigation, for the last 7 years. This, therefore, has made me intimately aware of the judicial system and the absolute need on the part of the parties involved in litigation for the expedient, efficient administration of justice. This is an absolute necessity for the parties.

In addition to this, as chief administrative officer, I have been involved in administering the affairs of this corporation, and this has given me the ability to handle multifaceted things in, I think, an efficient and an effective manner.

The CHAIRMAN. Ms. Bissell, I might ask you this question. How would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Ms. BISSELL. Sir, it would be my responsibility as a judge if I am confirmed to uphold the statute and the Constitution if it is clear on its face. That is my job, and what I personally think is of no import or impact in that situation.

The CHAIRMAN. From your excellent record in law school, having graduated magna cum laude from law school, the various legal articles you have written and the great experience you have had in business and in the law, do you have any hesitancy about accepting the responsibilities of this high position?

Ms. BISSELL. No, sir.

The CHAIRMAN. Without objection, I am going to place in the record at this point an editorial from the largest newspaper in South Carolina, The State, entitled "Reagan Chooses Bissell."

The first paragraph reads:

> President Reagan made a fine choice in nominating Ms. Jean Galloway Bissell of Columbia to the U.S. Court of Appeals for the Federal Circuit in Washington, D.C., and we hope the U.S. Senate will confirm her promptly so she will be the first woman from South Carolina to become a Federal judge.

I will not bother to read the rest of it. Without objection, I will place that in the record.

[Material submitted for the record follows:]

[From the State, Columbia, SC, June 4, 1984]

REAGAN CHOOSES BISSELL

President Reagan made a fine choice in nominating Mrs. Jean Galloway Bissell of Columbia to the U.S. Court of Appeals for the Federal Circuit in Washington, D.C.

We hope that the U.S. Senate will confirm her promptly. If so, she will be the first woman from South Carolina to become a federal judge.

The precedent is not the reason for her confirmation, however, she is well qualified. She has practiced business law since she was graduated from the University of South Carolina law school in 1958. In college she was elected to Phi Beta Kappa. She was associated with prestigious law firms in Greenville and Columbia.

Mrs. Bissell is vice president and general counsel for South Carolina National Corp., and executive vice president, general counsel and director of administration for South Carolina National Bank, for which she has worked since 1975.

The court to which she has been nominated is a new one, created two years ago by Congress to hear appeals from cases from federal courts in the Washington area. Included are the U.S. Court of Claims, and the U.S. Court of Customs and Copyright Appeals. There are 11 judges on the court, which is below only the U.S. Supreme Court.

Mrs. Bissell has the professional qualifications, the temperament, the intellect and dedication to the law which outstanding judges possess. She will serve the country well.

The CHAIRMAN. That is a very fine tribute that the largest newspaper in South Carolina paid you, Ms. Bissell. Of course, I already knew about your qualifications and I am not surprised that any paper in our State would write so nicely about you.

Ms. BISSELL. Thank you, sir.

The CHAIRMAN. We are very proud of your accomplishments and I am very pleased to have recommended the first woman in South Carolina to be a Federal judge and to be a judge on the circuit court here for the Federal district.

We wish you well and hope the Senate will confirm you promptly and hope you can take office soon.

Ms. BISSELL. Senator, thank you very much, and I would like to, for the record, thank President Reagan for my nomination, and sincerely thank you personally for submitting my name to the President and for the very expeditious way in which you have handled this hearing. Thank you, sir.

The CHAIRMAN. Well, it is a pleasure to have you here. A woman of your high caliber brings great prestige, I think, to the Federal bench, and we are honored that you have been nominated.

I have had the pleasure of knowing your family. Your father served in the legislature as a house member years ago when I was Governor of the State.

Ms. BISSELL. Yes.

The **Chairman**. He was one of the finest men I ever knew, and your record has been outstanding.

Ms. **Bissell**. Thank you, sir.

The **Chairman**. Good luck in your new service.

I see Senator D'Amato here from New York, and I know how busy Senators are so we will take him. I believe he was the Senator who came in next.

We will now have the U.S. Court of International Trade: Dominick L. DiCarlo, of New York, to be a judge of the U.S. Court of International Trade.

Senator D'Amato, we would be glad to hear from you.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator **D'Amato**. Mr. Chairman, thank you so very much. It is always good to appear before the distinguished chairman of the Judiciary Committee.

Generally, Mr. Chairman, it is traditional for those of us who are privileged to present nominees before this committee to extol their virtues, to indicate how proficient they are in the law, the excellence of their service, the judicial temperament that you are sure the nominee of the President will have, and the leadership he has provided.

In this case, Mr. Chairman, I am sorry that I just simply will not be able to do that because Mr. DiCarlo has set a record of such incredible standards that those words are totally inadequate, and because I thought I would even have him take his breath back for a moment by doing that.

The fact of the matter is I have known Mr. DiCarlo for more than 20 years, and during that period of time, Mr. Chairman, he has distinguished himself as a State legislator in New York, where he was chairman of the Codes Committee during a period of time and offered more legislation dealing with the criminal justice system and the judiciary system in the State of New York that has made sense than any of his predecessors or any of those people who have followed him.

He blazed an incredible record of endurance in the area of law and service of the people of the State of New York, and indeed this Nation. He served as a distinguished assistant U.S. attorney and chief of the Organized Crime and Racketeering Bureau. He has served this Nation, and does serve it, as the Assistant Secretary of State in charge of international narcotics, and, again, has set a record of the highest standards and traditions in Government.

So the usual introductions with respect to those nominees simply is inadequate as it relates to Dominick DiCarlo. Mr. Chairman, I will say briefly that I believe President Reagan has made a magnificent nomination in Dominick DiCarlo to serve in the Federal judiciary and to serve in this important area of the U.S. Court of International Trade.

The **Chairman**. I believe this nomination was made on your recommendation, was it not, Senator?

Senator **D'Amato**. That recommendation.

The **Chairman**. Well, we thank you very much.

You come highly recommended here by the distinguished Senator from New York and that will bear great weight with the Senate, I am sure.

Senator D'AMATO. Thank you, Mr. Chairman.

The CHAIRMAN. As long as you are here, will you stand up and be sworn?

Do you swear the testimony you give in this hearing will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. DICARLO. I do.

The CHAIRMAN. Now, if you will just step back, we will take these two Senators. They are in a hurry, I know, and we will call you up in just a few minutes.

I see Senator Cochran came in, and now Senator Long has come in. We would be glad for you gentlemen to come up and speak in behalf of your judges. I believe Senator Cochran is here in behalf of Tom S. Lee, to be U.S. district judge for the Southern District of Mississippi.

And Senator Long is here on behalf of John M. Duhe, of Louisiana, to be U.S. district judge for the Western District of Louisiana.

We will take either one of you, whichever one wants to go ahead.

Mr. SHORT. Judge Duhe and Mr. Lee, would you step forward to the table, please?

The CHAIRMAN. You all can have seats by your Senators.

All right. You may proceed.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator COCHRAN. Mr. Chairman, thank you very much. It is a real honor and a genuine pleasure for me to present and introduce to the Judiciary Committee my good friend, Tom Lee, from Forest, MS, who has been nominated by the President to serve as U.S. district judge for the Southern District of Mississippi.

Tom Lee grew up in a small town in our State, returned there after college and law school, and has been a true leader in the community and in his county in every good sense of the word.

He has practiced law there for 16 years and during that time he served as county prosecuting attorney. He has served in conspicuous positions of leadership in the community and in his church, helping solve community problems unselfishly and always with a commitment to the betterment of his community.

At the same time, Mr. Chairman, he has distinguished himself as a lawyer. He is professionally respected throughout the State of Mississippi, and I feel that our State is really honored by his acceptance of the President's nomination to be a U.S. district judge.

Mr. Chairman, when he was in college, at Mississippi College he did not make a single grade below an A. He was the outstanding graduate of his college, and went on to the University of Mississippi Law School and again was a stand-out student. He received numerous awards for his academic achievement, and at the same time he was selected by fellow students for positions of leadership.

As an example, he served as chief justice of the student judicial council at Mississippi College, and was selected as president of Omicron Delta Kappa, which is the honorary leadership fraternity.

In every way he is an outstanding individual. He has integrity, character and good judgment. He displays a great deal of commonsense to go with his keen intellect. And I think, Mr. Chairman, if he is confirmed by the Senate, he will serve with great distinction on the Federal bench and reflect credit not only on Mississippi, but on the entire Federal judiciary.

His father was chief justice of the Mississippi Supreme Court and his brother, Roy Noble Lee, who is here today, currently serves on Mississippi's Supreme Court. So as you can see, he comes from a very distinguished family of lawyers and jurists who are quite well respected throughout our State.

Mr. Chairman, I have not the words or ability to adequately describe to you the enthusiasm with which I present this nominee to you. Without reservation, I recommend him to you and hope the committee will confirm him. After you consider his qualifications, I think you will agree, too, that he is one of the finest nominees that the President has submitted to the Senate during his 4 years as President.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. We are delighted to have you here. The high esteem in which you are held in the Senate, I am sure, will benefit Mr. Lee. You have certainly spoken highly of him. He is evidently a very able, fine lawyer of character and ability, and your fine statement in his behalf will go a long way with the committee and the Senate.

We also have a statement from Senator Stennis in support of Mr. Lee, so we will submit it for the record, without objection.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR JOHN C. STENNIS

Mr. Chairman, it pleases me very much to have the opportunity to endorse the nomination to Tom S. Lee of Forest, Mississippi to serve as United States District Judge for the Southern District of Mississippi.

Tom Lee is an able and experienced attorney—a courtroom lawyer, a trial practitioner who will make an excellent District Judge. I have known him and members of his family for many years and have followed his career in the law with interest.

It was my privilege to serve as a Circuit Judge in Mississippi at a time when Tom Lee's father, Percy M. Lee, Sr., served with distinction as Circuit Judge in the adjoining district. Judge Lee later served as Chief Justice of the Supreme Court of Mississippi. Tom Lee's brother, Roy Noble Lee, another distinguished lawyer also served as Circuit Judge and is now a member of our Mississippi Supreme Court. Tom Lee comes from good stock, a family of lawyers—all of them good ones—and is himself an excellent lawyer.

Tom Lee has the character, the experience, the ability and the temperament to make an outstanding District Judge, and I fervently believe that the fine qualities which he possesses will enable him to render many years of fine service as one of the District Judges of the Southern District of Mississippi. I support his nomination and urge the Committee to recommend confirmation by the Senate.

Senator COCHRAN. Thank you, Mr. Chairman.

The CHAIRMAN. If you wish to stay, you are welcome to do so. If you wish to leave, you are excused.

Senator COCHRAN. I think I will stay.

The CHAIRMAN. All right.

Senator COCHRAN. Thank you very much for inviting me.

The CHAIRMAN. We are now pleased to have the able, distinguished Senator from Louisiana, my long-time friend, Russell Long, here. Senator, we would be delighted to hear from you.

STATEMENT OF HON. RUSSELL LONG, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator LONG. Thank you so much, Mr. Chairman. Mr. Chairman, I will leave immediately after this because the Finance Committee across the hall is meeting on some important legislation in which both I and my State are very much interested.

But first, I want to present my statement, and there will be a similar statement from Senator Johnston because the Appropriations Committee is meeting at this moment, but he might be able to pull away and make the statement personally. In any event, he will have a statement of the same effect.

The CHAIRMAN. Without objection, Senator Johnston's statement will follow your statement in the record.

Senator LONG. Both of us are strongly supporting Judge John Malcolm Duhe, Jr., who is a nominee for the Western District of Louisiana. We recommend him very highly. He is a 1957 graduate of Tulane University Law School. He was editor-in-chief of the law review at Tulane in 1957, and the associate editor in the previous year of 1956. He was also a member of the Order of the Coif.

Upon graduation from Tulane, Judge Duhe returned to his home town of New Iberia, where he practiced law in a highly respected firm, Helm, Simon, Caffery & Duhe. He practiced law in New Iberia until 1978, when he assumed the duties of judge of district E, 16th judicial district court, in Iberia Parish. He has also served as chief judge of this court.

Judge Duhe is a member of the Louisiana and the American Bar Associations, and he has served as president and secretary of the Iberia Parish Bar Association. He is also a member of the Louisiana Association of Defense Counsel.

Judge Duhe has been very active in numerous civic organizations in New Iberia. Because of his distinguished years of service as a judge of the 16th judicial district court of Louisiana, and previously as a practicing lawyer, Judge Malcolm Duhe, Jr., is well qualified to perform the duties of U.S. district judge and both of us strongly urge that you approve his nomination.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR J. BENNETT JOHNSTON

Mr. Chairman and Members of the Committee: I am very pleased to appear before the Committee today for the purpose of introducing to you John M. Duhe, Jr. of New Iberia, Louisiana, nominee to the U.S. District Court for the Western District of Louisiana.

Mr. Duhe is a 1957 graduate of the Tulane University School of Law. While at Tulane, he served as Associated Editor of the Law Review and a member of the Order of the Coif.

Upon graduation from law school, Mr. Duhe returned to New Iberia to practice law with the firm of Helm, Simon, Caffery and Duhe. In 1978, he withdrew from the firm in order to assume the duties as Judge of the Sixteenth Judicial District Court of Louisiana. Mr. Duhe continues to serve on that Court and has served as its Chief Judge.

Mr. Duhe is a member of the American Bar Association, the Louisiana State Bar Association and a member of the Louisiana Association of Defense Counsel.

Mr. Duhe has been very active in his community as President and member of the board of Iberia Tubercolosis Association. In addition, he has served on several Tulane Law School Alumni Committees, and in 1980 he was selected "outstanding alumnus" of Tulane Law School.

Because of his distinguished career, John Duhe is very well qualified to serve as a Judge to the U.S. District Court for the Western District of Louisiana and I recommend him very highly. I strongly urge you to approve his nomination.

The CHAIRMAN. Senator, we are glad to have you with us.

Mr. Duhe, I want to congratulate you upon being nominated by President Reagan for this high position. I want to congratulate you for being so highly endorsed by the second ranking Senator in the whole U.S. Senate, Senator Russell Long. Only one other Senator has been here longer than he has, I believe—Senator Stennis; I believe I am next in line; and also by Senator Johnston.

We are very pleased to have you, Senator, and you can stay or leave, whatever you wish to do.

Senator LONG. Thank you so much, Senator Thurmond. I have to go.

The CHAIRMAN. Now, without objection, Senator Stennis' statement will follow the statement by the able and distinguished Senator from Mississippi, Senator Thad Cochran.

Mr. Duhe, you might stand up and be sworn. And, Mr. Lee, you stand up and be sworn, too.

Do you swear the testimony you give in this hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

Mr. LEE. I do.

Judge DUHE. I do.

The CHAIRMAN. Mr. DiCarlo, you can come up and have a seat, too; we will get to you in just a minute. I do not think it will take very long to go through these.

Now, Mr. Lee, do you have any family here or friends you want to introduce?

Mr. LEE. Yes, sir. I am happy this morning to present my wife, Norma Ruth; my brother, Judge Roy Noble Lee, and his wife, Sue, and their daughter, Martha Passell. And I am also glad to see two friends from Forest, MS, my home town, who live here in Washington, Jan and Beth Ullman. I am glad for them to be here.

The CHAIRMAN. We are very pleased to have all of you here this morning for this important hearing. I know it is exciting to have a member of the family to be appointed a U.S. district judge, and we are glad to have you here.

Now, Mr. DiCarlo, do you have any family here?

Mr. DICARLO. Yes, Senator. I have my son, Vincent DiCarlo, who works here in Washington as an attorney with the Securities and Exchange Commission.

The CHAIRMAN. That is your son, you say?

Mr. DICARLO. Yes, sir.

The CHAIRMAN. You do not have any other members of your family?

Mr. DICARLO. No, sir.

The CHAIRMAN. Judge Duhe, do you want to introduce any family or friends you have?

Judge DUHE. I am here all alone, Senator. Thank you.

The CHAIRMAN. All right. We will now proceed.

Judge Duhe, you have served as a judge of division E of the 16th judicial district of Louisiana since 1979, I believe.

TESTIMONY OF JOHN M. DUHE, JR., NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF LOUISIANA

Judge DUHE. That is correct, Senator.

The CHAIRMAN. This, I believe, is a court with complete civil, criminal, juvenile, probate, and family jurisdiction.

Judge DUHE. We do it all.

The CHAIRMAN. Judge, I am confident that you are very knowledgeable of State laws. Now, I am wondering if you would foresee any difficulty in the transition from the State court system to the Federal district court.

Judge DUHE. Really not, Senator. I practiced law as a trial lawyer for 23 years, and a substantial portion of my trial practice was conducted in the Federal courts, so I am very familiar with the procedures and practices.

Even though I have had obviously no exposure in the Federal courts since I have been on the State bench, I was quite familiar with it before, and really foresee no difficulty.

The CHAIRMAN. Now, Judge, it has been suggested that our prisons turn prisoners into more professional criminals. What, in your opinion, can or should be done to improve the prisoner rehabilitation system?

Judge DUHE. Well, that, of course, is a problem that has plagued all of us in the system for years and I do not know that anyone has a truly satisfactory answer. It has been my personal experience that more emphasis on vocational rehabilitation within the prison system would be very beneficial.

I am convinced that many prisoners return to crime simply because they know no other trade when they are released, and if we could help them learn another trade, we could perhaps alleviate the problem.

The CHAIRMAN. I have often thought about that and I think you have made a very important point. A lot of times people go to prison and they come out and nobody wants to give them a job because they have been in prison. Most of them are not trained or skilled for any particular job.

I have often felt there ought to be an industry, maybe, right beside a prison where they could go and work, and maybe a vocational school to teach them a skill and allow them to work, rather than just sit in prison and rot.

I think we have got to do more along that line at the Federal level and at the State level, too.

Judge DUHE. I certainly concur, Senator.

The CHAIRMAN. Now, Judge, in response to a portion of the committee questionnaire concerning judicial activism you stated, "Judicial restraint does not equate with slavish adherence to the principles of stare decisis."

Judge, what is the proper application of stare decisis, as you see it, in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Judge DUHE. I think the first duty of the Federal judge is to recognize that he is a resolver of disputes and not a political scientist or a legislator. In many cases, you do not have to get to the constitutional issue if you keep that in mind.

If, however, the constitutional issue must be faced, and if the precedent, as the question states, is a precedent of my own court, I think that my position would be to explain as thoughtfully as I could what my interpretation of the constitutional issue was and to decide the particular controversy based on that interpretation.

If, however, the precedent was from a higher court that reviewed decisions of mine, I think it would be inappropriate for me to render a decision in the particular dispute that was not in harmony with the higher court's determination. But that would not prevent me, hopefully with some thought, from explaining why I thought differently about the constitutional issue.

The CHAIRMAN. Well, again, Judge, I congratulate you on your appointment and we hope you have a pleasant service on the Federal bench.

Judge DUHE. Thank you, Senator.

The CHAIRMAN. And you are now excused, if you wish to leave.

Judge DUHE. Thank you.

The CHAIRMAN. Senator Cochran, do you want to come up and sit with us up on the bench here?

Senator COCHRAN. Thank you, Mr. Chairman. I will just be here with the family members of Judge Lee.

The CHAIRMAN. Mr. Lee, again I congratulate you on your appointment by President Reagan to this position.

TESTIMONY OF TOM S. LEE, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF MISSISSIPPI

Mr. LEE. Thank you, Senator.

The CHAIRMAN. And I again congratulate you on having the fine endorsement of both Senators.

Mr. LEE. Thank you, Senator.

The CHAIRMAN. And I congratulate you upon being recommended for this position by the able and distinguished Senator, Senator Cochran, of whom we are all very proud here in the Senate.

Now, Mr. Lee, you have been a practicing attorney since 1965, I believe. During this time, you served approximately 3 years as youth court judge for Scott County, and as municipal judge for the city of Forest, MS. Do you think this experience will help you in performing the duties of a Federal district court judge, and if so how?

Mr. LEE. Senator, the offices of municipal judge and youth court judge, of course, do not compare with the office of Federal district judge. But, certainly, judicial experience is an asset in preparing one to serve as Federal judge.

All judges, in whatever capacity they serve, are governed by the same standards and ethics, and they should also have a proper judicial temperament. As a municipal judge and youth court judge, I have had the opportunity to hear and evaluate both sides of a case and to develop a perspective and feeling for the administration of justice.

The Chairman. Mr. Lee, would you give us your opinion on the suggestion that attorneys undergo special training before being allowed to practice in Federal courts?

Mr. Lee. I could answer that question better after being on the Federal bench and having an opportunity to see how the lawyers perform. I have seen a number of lawyers in the courtroom who were young and inexperienced, but after only a few appearances they would become some of the most able and competent lawyers in the Federal system.

The law schools teach Federal procedure and the Federal rules of evidence, and a person who graduates from a law school should be qualified to practice law in the Federal court. In fact, there is not that much difference in the Federal courts and the State courts in Mississippi, inasmuch as Mississippi has basically adopted the Federal rules procedure.

My feeling now is that I will be in favor of granting a lawyer a chance to practice his profession rather than require him to obtain additional schooling before being able to practice in the court.

The Chairman. Mr. Lee, are there any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. Lee. In a democratic society a Federal judge should bear in mind that the law-making function belongs to Congress and not to the judiciary. Since I believe in the Constitution and the system of separation of powers, the judge should decide issues of law and grievances of the parties before him and should not attempt to legislate.

It is a function of the legislature, as the elected representatives of the people, to make the laws. And even though I might disagree with a particular law, I believe it would be my duty as a judge to apply that law according to its meaning.

If that meaning were ambiguous or uncertain, I would then try to determine the intention of the law-making body through the text and surrounding legislative history.

The Chairman. Mr. Lee, we are very pleased to have you with us. We hope you have a happy and successful service on the Federal bench, and you are now excused.

Mr. Lee. Senator, may I say for the record that I very much appreciate Senator Cochran's recommending me for this nomination and for his gracious and generous statement this morning; President Reagan for his confidence in nominating me; and Senator Stennis for his statement of support.

I thank you, sir, and the committee for your consideration and for the courtesies that you have extended to me.

The Chairman. Thank you. You are now excused, if you wish to leave at any time.

Senator Cochran, we are very pleased to have you with us.

Senator Cochran. Thank you very much, Mr. Chairman.

The Chairman. Now we are going to Mr. DiCarlo.

Mr. DiCarlo, the Customs Court Act of 1980 provides for the U.S. Court of International Trade. This court has jurisdiction over any civil action against the United States arising from Federal laws governing import transactions.

What advantages, in your opinion, does the new court provide over the previous customs court?

TESTIMONY OF DOMINICK L. DiCARLO, NOMINEE, JUDGE, U.S. COURT OF INTERNATIONAL TRADE

Mr. DiCarlo. I think, sir, it was the intent of Congress to consolidate all actions of a similar nature dealing with those transactions in one court. They furthered that objective first by taking out any ambiguity in the law as to whether or not various cases belonged in the district court or in this Court of International Trade. I think removing those ambiguities was a great step forward.

Second, Congress enlarged the jurisdiction of the court, bringing within the court different types of actions which formerly had not been under its jurisdiction. And then Congress completed the change by making this truly an article III court, giving it powers that it never had before, such as rights to issue injunctions, et cetera.

So I think with these added elements, Congress has greatly enlarged the court and given it powers that it did not have.

The Chairman. Mr. DiCarlo, you have served with the State Department since 1981, I believe, in the capacity of Assistant Secretary of State for International Narcotics Matters, is that correct?

Mr. DiCarlo. That is correct, sir.

The Chairman. With this background, can you recommend any changes to the Customs Court Act that you feel would improve the new Court of International Trade?

Mr. DiCarlo. Sir, I think being with the State Department has given me a perspective of what goes on overseas.

Perhaps at a later time when I have had some experience with the court, I would be in a much better position to make those recommendations. At this time I think it would be presumptuous of me to make a recommendation. I do not yet have the experience in that court to put together with my experience overseas and make the recommendations at this time.

The Chairman. As time goes by, if you have any recommendations do not hesitate to make those to us.

Mr. DiCarlo, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does the phrase "judicial activism" mean to you?

Mr. DiCarlo. Sir, I believe what it has come to mean is as you stated. It is a euphemism for judges exceeding their authority given to them under the Constitution. I think what it should mean is perhaps—well, perhaps illustrated by going back to a question you have asked of the first witness as to how to relieve backlogs and the tremendous workload of the courts.

I think what it should mean is the judges getting down to do the work, deciding cases and rendering their decisions.

The Chairman. Sometimes I wonder if judges remember that the legislative bodies of the country make the laws—the legislative bodies at the State level and the Congress at the national level—

and that the executive administers and enforces the laws, and the judicial interprets the law. We have those separations and they are checks and balances on each other. If we all would follow that in each of the branches of Government, I think we would probably have less trouble than we do.

I think that is all the questions I have. I want to wish you a successful service on the bench. I hope we can get the Judiciary Committee to act promptly on these nominations so we can get them out.

Mr. DICARLO. Sir, if it would be proper at this time, I would like to express my thanks to the President for his nomination, to Senator D'Amato for this recommendation, and to the chairman and the committee for the expeditious manner in which they handled these procedures.

The CHAIRMAN. Well, I hope you enjoy your service on the bench.

Now, without objection, I want to have a résumé of each of these four judges placed in the record.

We have placed the names of these judges on the agenda this morning. The Judiciary Committee meets at 10:15 and I am hoping we can get a quorum then, hoping there would be no objection to any of them, and if not they could be approved by the committee today. If there is objection—and any member of the committee can object—we will carry it over at least one week.

So we are going to meet at 10:15, if any of you wish to remain around until then. We will now stand adjourned.

[Whereupon, at 9:38 a.m., the committee was adjourned.]

BIOGRAPHIES

JEAN GALLOWAY BISSEL

NOMINEE, U.S. CIRCUIT JUDGE, FEDERAL CIRCUIT

Birth: June 9, 1936, Due West, S.C.

Legal residence: South Carolina.

Marital status: Married to Gregg Claude Bissell.

Education: 1952-54—Erskine College; 1954-55—University of South Carolina, B.S. degree; 1955-58—University of South Carolina School of Law, L.L.B.

Bar: 1958—South Carolina.

Experience: 1958-65—Haynesworth, Perry, Bryant, Marion & Johnstone Greenville, S.C., associate; 1965-71—Haynsworth, Perry, Bryant, Marion & Johnstone, partner; 1971-76—McKay, Sherrill, Walker, Townsend & Wilkins, Columbia, S.C., partner; 1976 to present—South Carolina National Corporation and The South Carolina National Bank, Columbia, S.C., general counsel; 1976-80—South Carolina National Corporation, senior vice president; 1980-81—South Carolina National Corporation, executive vice president; 1981 to present—South Carolina National Corporation, vice chairman and chief administrative officer.

DOMINICK L. DICARLO

NOMINEE, JUDGE, U.S. COURT OF INTERNATIONAL TRADE

Birth: March 11, 1928, Brooklyn, NY.

Legal residence: New York.

Marital status: Married to Esther Hansen DiCarlo, 4 children.

Education: 1946—St. John's College, 1948-50—B.A. degree; 1951-53—St. John's University School of Law, LL.B. degree; New York University School of Law, LL.M.

Bar: 1954—New York.

Military service: 1946-48; 1950-51—U.S. Army.

Experience: 1954-57—Allstate Insurance Co., attorney and adjuster; 1956—Association of Casualty & Surety Companies, research attorney (part-time); 1957-58—Private practice; 1957-59—Fidelity & Casualty Co., investigator; 1959-62—Assistant U.S. Attorney, Eastern District of New York; 1962-63—Amideo N. Guzzone, Esq., attorney; 1962-64—New York City Council, counsel to the minority leader; 1963-81—Private practice, 1965-81—New York State Assembly, Assemblyman; 1981 to present—Assistant Secretary of State, Bureau of International Narcotics Matters; 1982 to present—U.S. Representative Commission on Narcotic Drugs, United Nations Economic And Social Council Vienna, Austria.

JOHN M. DUHE, JR.

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF LOUISIANA

Birth: April 7, 1933, New Iberia, LA.

Legal residence: Louisiana.

Marital status: Divorced, 4 children.

Education: 1951—University of Southwestern Louisiana; 1951-53—Washington & Lee University; 1953-57—Tulane University, BS degree (1955), LL.B. degree (1957).

Bar: 1957—Louisiana.

Experience: 1957-78—Helm, Simon, Caffery & Duhe, New Iberia, LA; 1979 to present—Judge, Division E 16th Judicial District Court of Louisiana.

TOM S. LEE

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF MISSISSIPPI

Birth: April 8, 1941, Jackson, MS.

Legal residence: Mississippi.

Marital status: Married to Norma Robbins Lee, 2 children.

Education: 1959-63—Mississippi College, B.A. degree; 1963-65—University of Mississippi Law School, J.D. degree.

Bar: 1965—Mississippi.

Experience: 1965 to present Lee, Lee & Lee Forest, MS; 1968-72—Scott County Prosecuting Attorney; 1979-82—Youth Court judge, Scott County; 1982—Municipal judge, city of Forest.

CONFIRMATION HEARINGS ON:

ROBERT M. HILL, FRANKLIN S. BILLINGS, JR., RUDI M. BREWSTER, JAMES M. IDEMAN, WILLIAM J. REA, AND PETER K. LEISURE

WEDNESDAY, JUNE 13, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to call, at 2:09 p.m., in room SD-226 of the Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Leahy.

Staff present: Robert J. Short, chief investigator; Allen Spence, investigator; and Joseph Kopka, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The **Chairman**. The committee will come to order. We are met today to hold hearings on certain nominations. First is Robert M. Hill of Texas to be U.S. circuit judge for the fifth circuit.

Then we have others.

Senator Tower, we will take you first so you can make your statement. I know you want to be excused to get back over to the Senate floor. So you may proceed.

STATEMENT OF HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **Tower**. Thank you very much, Mr. Chairman. It is my pleasure to present this afternoon Judge Robert Hill, who has been nominated by the President to the Court of Appeals for the Fifth Circuit. I ask unanimous consent that I may submit a complete statement for the record.

The **Chairman**. Without objection, your entire statement will go in the record.

Senator **Tower**. Mr. Chairman, I have known Judge Hill for all of his professional life. He was a very distinguished trial lawyer in our State for several years. He has served as Federal district judge for the Northern District of Texas since 1970, is eminently qualified for the circuit bench, and is very widely respected not only by members of the bar but by his fellow jurists. He is qualified in every way to serve in the position for which he is nominated.

I might note, as a further footnote, Mr. Chairman, that his uncle, Joe Hill, the State senator in Texas back in 1948, was a "Dixiecrat" that supported a young fellow by the name of Strom Thurmond for the Presidency of the United States.

The CHAIRMAN. Well, he must be a man of good judgment. [Laughter.]

Senator TOWER. I just thought I'd throw that in, Mr. Chairman, because I didn't think it would hurt anything.

Mr. Chairman, I could of course go on at great length reciting a litany of the achievements of this very public-spirited man, very fine professional man, but I have submitted my statement for the record so as not to detain the committee, but I would urge speedy confirmation. We do have quite a workload in the fifth circuit, and Judge Hill is ready to go to work, and, by virtue of his experience, he won't take much of a breaking-in period.

And we would ask the committee to speedily and expeditiously report his nomination favorably to the Senate.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR JOHN TOWER

Mr. Chairman, I am pleased and honored to introduce to you today Judge Robert Madden Hill, who has been nominated by the President to the Court of Appeals for the 5th Circuit. Bob Hill is a native of Dallas, where he is well-known and respected. He received his undergraduate and law degrees from the University of Texas at Austin and is a member of the Texas State Bar and the Dallas Bar Association.

I had the pleasure of recommending Bob to the President and the Attorney General in 1970 for the Federal District bench. Having observed him for 14 years, I can say without equivocation that throughout his tenure as a Federal judge, Judge Hill has demonstrated the highest degrees of fairness and adherence to the precepts of our Constitution. Prior to 1970, Bob Hill had already distinguished himself admirably as a trial lawyer during his 20 years of private practice with the Dallas law firms of R.T. Bailey; Caldwell, Baker, Jordon, and Hill; and Woodruff, Hill, Kendall, and Smith.

As a member of the Federal bench, Judge Hill has consistently demonstrated the sort of judicial temperament that has greatly enhanced our Federal judicial system. His integrity, expertise, and intimate knowledge of the law are recognized and respected by his peers and colleagues.

I believe that Judge Hill, if confirmed by the Senate, will bring these same outstanding qualities to the Appellate Court. He has the personal integrity and compassion for his fellow human beings, as well as extensive professional experience that uniquely qualify him for the Court of Appeals. Should he be confirmed, I am confident of his ability to assume this important position.

Mr. Chairman, this nomination signifies the commitment of this Administration to appoint the most impartial and disciplined jurists to our Federal judiciary, and is well in keeping with the tradition of excellence in the 5th Circuit Appellate Court. I believe that Judge Hill can and will fulfill the enormous responsibility of providing an equitable and impartial system of justice, a right guaranteed by our Constitution to all of our citizenry.

Therefore, Mr. Chairman, I am very pleased to endorse the President's nomination of this great jurist and Texan. Further, I recommend without reservation that the nomination of Robert Madden Hill be reported favorably to the Senate for its advice and consent.

The CHAIRMAN. Thank you very much, Senator. With your endorsement here—I am sure you recommended him for this position, President Reagan has appointed him—I congratulate President Reagan on appointing this well-qualified man. He has made a fine success, I am informed, on the district bench and is now being promoted to the circuit bench.

And with your great influence in the Senate, I think he stands a fine chance to be confirmed.

Senator LEAHY. Mr. Chairman, just a moment—I didn't hear Senator Tower's position—did he say he was for him? Is that the point he was leading up to?

Senator TOWER. Very strongly, Senator Leahy.

The CHAIRMAN. Well, Senator Tower, you are now excused. Thank you very much for taking your time here, and we are very pleased to have such an outstanding and esteemed Senator and chairman of the Armed Services Committee to come and appear before this committee.

Senator TOWER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. I see Senator Stafford back there. I'm sorry I didn't see you when you came in, Senator.

Senator Stafford, come around. Senator Stafford and Senator Leahy are recommending Judge Billings of Vermont. We are very pleased to have you here, Senator Stafford. Senator Leahy, of course, is a prominent member of this committee whom I depend upon a lot and try to induce him to vote with me, and occasionally it happens. I am very pleased to have him appear here, too.

So you gentlemen may proceed. Senator Leahy, you are a member of the committee—do you want to go first or will you yield to Senator Stafford?

Senator LEAHY. I will yield to my distinguished colleague, Mr. Chairman.

The CHAIRMAN. Senator Stafford is the chairman of the Public Works Committee of the Senate, a very able Senator, and we are very honored to have him here before this committee.

STATEMENT OF HON. ROBERT T. STAFFORD, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator STAFFORD. Thank you very much, Mr. Chairman, for your gracious remarks, and I thank Senator Leahy for yielding for me to first present to you Franklin S. Billings, Jr., who is the chief justice of Vermont's Supreme Court, and the President's nominee to be a member of the U.S. district court bench for the District of Vermont

I have known Justice Billings since the middle 1950's when I had the privilege of serving as Vermont's Lieutenant Governor, at which time Mr. Billings was the secretary of the senate, which meant he not only kept track of what was going on in the senate, but he was in effect the parliamentarian for the senate at that time and kept the Lieutenant Governor, as far as he could, out of trouble.

A little later I became Governor of Vermont, and Mr. Billings at that time became the secretary of civil and military affairs of the State, which is an archaic title for executive secretary to the Governor.

So I have known our chief justice a good many years and have found him to be a very able and public-spirited man.

From 1961 until 1966, he served in the Vermont Legislature, and in 1963 he was elected the speaker of the Vermont house of representatives, where he served until 1966. In 1966 he was appointed and in 1967 elected to the highest trial bench in Vermont, our superior court, and he served there for a number of years with distinction, until he went to the supreme court in 1975, where he served until January 1, 1983, when he became the chief justice of our supreme court.

Both knowing him personally, knowing his wife, his four children, the fact that he is a native of a town near where I grew up, and his excellent reputation on the bench and bar, and with the general public of Vermont, I without qualification recommend him very highly to be the U.S. district judge.

Mr. Chairman, I urge and hope for his speedy confirmation in that post, since there is a lot of work to be done in Vermont on our U.S. district court bench.

The CHAIRMAN. Senator Stafford, we are very pleased to have you with us, and I am sure the endorsement of you and Senator Leahy both carry great weight here, and he should be confirmed forthwith. We will expedite the nomination all we can.

Senator STAFFORD. Thank you very much, Mr. Chairman.

The CHAIRMAN. It's an honor and a pleasure to have you before this committee, and you may remain or, if you are busy, feel free to leave.

Senator STAFFORD. Thank you, sir.

The CHAIRMAN. Senator Leahy, a distinguished member of this committee, we will now hear from you.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Mr. Chairman, as the chairman noted, there are those occasions when the chairman and this member of the committee do join hands and vote together on issues; we have done it in criminal matters, in regulatory reform matters, and I suspect we will do it on this judgeship, too.

I want to concur totally with what Senator Stafford has said. I think it is an extremely good choice, both his recommendation of Justice Billings, and President Reagan's appointment.

I first knew Justice Billings when he was Speaker of the House of Vermont and I was a newly out of law school 24-year-old lawyer just starting practice with a law firm in Burlington, and was told that it would also do me good to learn something about the laws of the State of Vermont, which had some sense of logic to it, if I was going to be practicing under those laws—and I was appointed draftsman for our State legislature, a position actually the appointment to which was really made by the Speaker of the House, being Justice Billings, who called me into his office and said, young man—and at that time I looked young—I had hair back then, Mr. Chairman, it was an interesting phenomenon that I barely remember—but the Speaker brought me in and said, young man, you need to get some experience and the Governor has told me that you are a bright young lawyer, which made me think that he had the wrong person—but he said we are going to give you a chance, and he said go out and draft these laws; you can do it one of two different ways: you can either sort of work around here part time and not accomplish much of anything or you can work day and night and weekends and maybe people will appreciate you and remember you.

I thanked him very much and told him how much I appreciated getting that job and if I could ever do the same for him, I would. And so therefore, Mr. Chairman, that and the fact that I predict will go down in history as not only one of the finest jurists the State of Vermont has ever had, but one of the finest the country has had. And I strongly, wholeheartedly back Justice Billings.

I did say to your staff, in reviewing his background, that the dozens and dozens, actually hundreds of background reports that I have read—I say this before you in all honesty—I have not read one superior to Justice Billings. It is an extraordinary report and background report; there is not one iota of hesitation on the part of anybody. I know a number of the people who are in there; they range across the political spectrum in our State, they are all distinguished people, and they all unhesitatingly endorsed him. And I have not in my years on this committee read a report that matches that.

The CHAIRMAN. Thank you very much, Senator. We appreciate the fine endorsement that you have given to the nominee here, Judge Billings. And if you wish to come around and sit up here with us, and Senator Stafford—we would be glad to have him come up, if he would care to.

Senator STAFFORD. Thank you very much, Mr. Chairman, but——

The CHAIRMAN. You want to get back to your work, Senator, or do you want to remain longer?

Senator STAFFORD. I have another committee to run, like you.

The CHAIRMAN. Well, I can understand how busy you are, and we appreciate your presence here, and I am sure your recommendation brought about his appointment, and President Reagan it appears has made a good selection, and we want to thank both you and Senator Leahy for your presence and making such laudatory statements about him.

Senator STAFFORD. Thank you, Mr. Chairman.

Senator LEAHY. Mr. Chairman, may I bring Judge Billings over here just to shake hands with you?

The CHAIRMAN. I would be delighted.

[Chairman and nominee shake hands.]

The CHAIRMAN. Senator Wilson of California. I believe you have three nominees here, Senator.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Yes, I do, Mr. Chairman.

The CHAIRMAN. Do you want to bring them up with you to the table?

Senator WILSON. Yes, if I may.

The CHAIRMAN. First I believe is Rudi M. Brewster of California to be district judge for the southern district; James M. Ideman of California to be district judge for the central district; and William J. Rea of California to be district judge for the central district.

We would be very pleased to hear from you, Senator Wilson.

Senator Wilson. Thank you very much, Mr. Chairman. I am honored to have this opportunity. I might observe to the nominees that the distinguished chairman of this committee is also a very high-ranking member of the Armed Services Committee, and I mention that, Mr. Chairman, because in addition to their qualifications for this office, while I can't find in their background an uncle who was a "Dixiecrat" who supported the candidate for the office of president some years ago, I do note with great interest, and I think you will, too, that they all have had some distinguished military service. And close to that "Dixiecrat" sympathy, I would point out that Judge Ideman is a distinguished military graduate of an institution which I am sure you are more than familiar with, called the Citadel.

The Chairman. One of the best in the country.

Senator Wilson. I thought you would have some sympathy for that.

I think he will also find some favor with you because he spent his active duty time, before going to law school and becoming a judge advocate, as a member of the airborne infantry, which is something else you have in common.

Judge Rea was a distinguished naval officer, received a spot promotion to lieutenant commander and was given command of a destroyer, and won eighteen battle stars in World War II.

Mr. Brewster is a captain in the Naval Reserve—he is a naval aviator. And Judge Ideman is also Colonel Ideman.

Now these gentlemen are seeking an opportunity for additional Federal service in a different capacity.

It is with genuine satisfaction, Mr. Chairman—and I will admit, I hope with pardonable and very great and sincere pride—and with anticipation of very good things for the State and the Nation, that I come before this committee to introduce these three distinguished individuals.

The President has selected William J. Rea and James M. Ideman for the Central District of California and Rudi M. Brewster for California's Southern District. All three bring enormous legal talent, skill, experience, and the highest reputation. They will bring these qualifications to the Federal bench in their respective districts after having been graded by their peers in the legal community as the best possible people to serve on the bench.

I am confident that each will reflect credit on himself and the appointing authority.

Because each has a long and distinguished biography, I could not quite do justice to them by picking out really only the highlights of their distinguished careers. Let me tell you why in each case the selection panel which I have asked in both the Central District and in the Southern District for California to interview and to grade judicial candidates, has afforded to each of the nominees the highest possible classification, that of extremely well-qualified. That is because they enjoy, without exception, an unblemished reputation for great professional skill, for the highest demeanor, and for the highest reputation for judicial temperament and good character.

William John Rea has been serving as a judge of the Los Angeles County Superior Court since 1968. His peers honored him in 1982 as the "trial judge of the year." Lawyers in Los Angeles consider him a "judge's judge," and it is not unusual to hear judges who have been before him say that "his decorum is the best of any judge before whom I have ever practiced." His tenure on the bench has followed almost 20 years of private practice.

James M. Ideman was elected to the Los Angeles Superior Court in 1978. He has become a well-known and very highly regarded administrator and specialist in criminal law. His duties on the bench have been supplemented by important administrative and supervisory responsibilities. His 15 years experience as a deputy district attorney included direct handling of many famous cases, many criminal cases that have become part of the lore of southern California and indeed of the ninth circuit. His extensive military judicial service is also an important component of Judge Ideman's broad legal experience.

Rudi Brewster has practiced law in San Diego for a quarter of a century. And for not quite that long I was the mayor of San Diego—it seemed longer to some people. But, as a result, I had the opportunity to get to know Mr. Brewster both personally and professionally. He has been rewarded for the skill and very high degree of conscientiousness which he has brought to his practice as a trial lawyer by election, in 1978, to the American College of Trial Lawyers, which, as the chairman and the committee are well aware, includes the top 1 percent of trial lawyers across the country.

Mr. Chairman, only because you have before you the full record of these three distinguished candidates, will I not go on at length, at the length which each of them deserves. I will simply submit their biographies and their résumés as part of the official record.

Today I bring you three superbly qualified nominees. They are entirely deserving of the confidence which the President has placed in them, and I would respectfully urge the committee's early and favorable treatment of these nominations so that they can go to their respective benches, where I can assure the chairman they are eagerly awaited. They will be more than pleased to answer your questions, and, indeed, I will as well.

But I will take no more time of the committee. I feel very privileged to be here. And let me say that each today is supported by a handsome family, and they are present in the chamber—and, if I may ask the chair's indulgence, I would ask that first Judge Ideman's family stand. He has friends with him as well.

The CHAIRMAN. Very pleased to have you with us.

Senator WILSON. Next, Mr. Brewster's family.

The CHAIRMAN. Very pleased to have you with us.

Senator WILSON. And, finally, Judge Rea's family

The CHAIRMAN. We are glad to have you all with us.

Senator WILSON. His wife and son are here.

Thank you, Mr. Chairman, I won't go on, simply because I don't feel that I could do justice to these gentlemen. It's hard to capsule these careers in a few minutes—but the committee's time is precious.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR PETE WILSON

Mr. Chairman: with a fair bit of satisfaction, some sincere pride, and much anticipation of good things for California and the Nation, I come before the committee this afternoon to introduce three distinguished individuals, each of whom has been nominated by the President of the United States for appointment to the Federal bench in California. The President has selected William J. Rea and James M. Ideman for the central district of California and Rudi M. Brewster for California's southern district. All three bring tremendous legal talent, skill, and experience to the Federal bench and were graded by their peers in the legal community as the finest possible people to serve on the bench. Each will reflect credit on himself, the court, and the Federal Judiciary. I recommended these highly seasoned lawyers to President Reagan and want to convey to you my wholehearted support for these appointments.

This committee is aware of my subscription to the concept of judicial qualifications review committees. In each of California's four Federal districts, eminent attorneys and judges review the credentials of prospective Federal judges—individuals who have been recommended to me, expressed their own interest, and have been solicited by my committee members. A state chairman coordinates the findings and sends them to me for consideration. For each of today's nominees, these committees have found them extremely well-qualified. I am proud that the President and officials within both the White House and Department of Justice have concurred in my judgement that these three jurists are among the best legal talents that California has to offer.

William John Rea has been serving as a judge of the Los Angeles County Superior Court since 1968. Hs peers honored him as the "Trial Judge of the Year" in 1982. Lawyers consider him a "Judge's Judge," and it is not unusual to hear that "his decorum is the best I have ever practiced before." His tenure on the bench followed almost 20 years of private prictice.

James M. Ideman was elected to the Los Angeles Superior Court in 1978. His duties on the bench have been supplemented by important administrative and supervisory responsibilities. His 15 years of experience as a deputy district attorney included direct handling of many famous—I should say infamous—criminal cases. His extensive military judicial service is also an important component of Judge Ideman's board legal experience.

Rudi I. Brewster has practiced law in San Diego for a quater of a centary. He has a reputation, in the town of which I was mayor for almost half that time, as one of the area's most respected trial attorneys. Indeed, he was elected in 1978 to the American College of Trial Lawyers, which, as the committee is aware, includes the top one percent of trial lawyers across the country.

Mr. Chairman, I could go on and on with praise and background details of these three impressive legal achievers. However, their biographies or résumés will be part of the official record, and you have conducted an independent review. I am confident that the committee will reach the conclusion that the respective district court will benefit form these appointments.

I appreciate this opportunity to come before you today and encourage the committee to report favorable so the Senate can soon give its advice and consent to these nominations.

[From the Daily Journal, Sept. 1, 1982]

JUDGE WILLIAM J. REA

(By Don J. DeBenedictis)

A couple of years ago, lawyers in the San Fernando Valley worried that Judge William J. Rea might work himself to death.

Rea was the supervising judge of the heavily backlogged Los Angeles Superior Court branch in Van Nuys, a position he'd held since 1971. Along with his administrative duties, he ran the civil master calendar, conducted a few settlement conferences each day, held trials, "and was sort of the back-up to any other judge that needed backing up," he said.

"Bill Rea was just a whirlwind in Van Nuys. He did everything," said a well-known plaintiffs' lawyer in the Valley. "Everybody was afraid he was going to give himself a heart attack." The lawyer recalled more than once seeing the judge at the courthouse at 8 a.m. and again at 7 p.m. on the same day.

"Bill is one of the hardest-working judges I've seen, if not the hardest," added another Van Nuys civil lawyer.

In mid-1980, Rea was relieved of his supervisorial post, and he transferred to a civil trial department at the downtown courthouse. One lawyer in the Valley believes "he went downtown almost to get a break."

But actually the judge misses the hectic pace he used to set for himself. Though he admits he was "really spread pretty thin" in Van Nuys, he enjoyed the job nonetheless. "I miss being supervising judge, where I could make things happen and do things and keep things going the way I like to keep them going," he said.

"I feel that I don't have as much to do here as I did out there. I don't have the responsibilities that I had there of running the calendars and administrative functions that I had to fulfill daily . . . if I had my druthers I would have probably stayed."

UNWRITTEN RULE

Rea left Van Nuys and the supervising position because Superior Court Presiding Judge Richard Schauer asked him to. "I think there is sort of an unwritten rule that judges don't stay on those supervising jobs for more than two or three years," Rea commented, "and I'd already stayed beyond that period of time . . .

"I guess I can't blame them," the judge continued wistfully. "At the time, I didn't understand. But I guess I can understand why they want to give everybody an equal chance for the job."

Rea, who is 62, still works as hard as he can on his present assignment. "I enjoy being busy rather than being non-busy," he explained. "In other words, I like to feel that I'm accomplishing as much as I can accomplish in a given day be going all out."

Last year, he was one of six judges selected to hear settlement conferences full time. In February, he returned to a trial assignment, but he kept a smaller load of settlements to work on. On a typical day, he has two conferences in the morning, a trial during most of the day, and a third settlement conference at the end of the day. Rea also sits as a member of the court's BAJI committee, which writes the widely used Book of Approved Jury Instructions.

However, his frenetic pace does not grow out of a frenetic personality. He speaks softly and slowly, and he sits quietly, gazing out his chambers window as he talks "Well, I'm not the jumpy, flighty type, I guess," he said.

The judge also dismisses the notion that he might be a workaholic "I think I put in a lot of hours, and I work hard when I work," Rea explained, "But when I play, I guess I play hard too."

LOOKS LIKE A JUDGE

Lawyers seem to like the work he does. They even like his gray-haired, bespectacled appearance. For instance, a plaintiffs' personal injury lawyer said, "He lets you try your own case, he puts the jury at ease, and puts the lawyers at ease, and he looks the way a judge should look."

"He's everybody's favorite person. He's a judge's judge," claimed another lawyer from Van Nuys. "He not only looks like a judge, but his decorum is the best I've ever practiced before."

That lawyer also praised Rea's ability to put aside his own conservative views when deciding a lawsuit. A second attorney noted that Rea was selected as the most recent trial judge of the year by the Los Angeles Trial Lawyers Association and is well liked by the plaintiffs' bar, even though he was an insurance defense lawyer in practice himself.

Rea concentrated on defending negligence cases—particularly medical malpractice cases—for 18 years in private practice, first in Los Angeles and later with a Santa Ana firm. A Los Angeles native, he graduated in 1942 from Loyola University, where he won a baseball scholarship.

He had joined the Navy the year before and immediately after graduation left for training. Rea spent most of World War II in the Pacific aboard a destroyer.

After the war, he moved to Denver to study law at the University of Colorado. He had been accepted at USC and Stanford, but his wife-to-be lived in Denver, he said. They remained there a year after he graduated in 1949 while Rea worked for the Census Bureau. Then they moved back to Los Angeles.

PRIVATE PRACTICE

While studying for the bar exam and waiting for the results, Rea worked as an adjuster for the Farmers Insurance Group. When he was admitted to practice in 1951, he went to work for the insurance company's law firm. He stayed, as a trial lawyer, for 14 years.

In 1964, he followed a former partner at the firm into a new partnership in Santa Ana. Among other clients, the Orange County firm represented the company within the Farmers Group that insured hospitals. Rea said that he soon represented nearly all the hospitals in the county and many of the doctors. Therefore, he began to specialize more and more in medical malpractice cases.

Along the way, Rea became active in the American Board of Trial Advocates (ABOTA), a trial bar association begun in Los Angeles with a core membership of defense lawyers. By 1968, he had been elected to serve as the president of both the L.A. chapter and the national organization.

Coincidentally, that same year Gov. Ronald Reagan named Rea to the Los Angeles Superior Court. Although Rea's practice was based in Santa Ana, he had continued to live in Pacific Palisades, near Santa Monica.

So in 1969, he took over the presidency of ABOTA and his spot on the bench. "I don't know if there's any impropriety connected with that," the judge said. "I hope not." Rea argued that by then the association was no longer strictly a defense group.

Today, he said, "it represents the cross-section of the trial bar." He still serves on the group's national executive committee and this year heads the constitution and by-laws committee.

TRIAL BY JURY

One of the guiding principles for which ABOTA was founded, the judge noted, was to defend the jury system. "The reason for our existence, I suppose, is to preserve trial by jury. . . ," he said. "It's not the perfect system, but up to now, in my opinion, the system has certainly protected our citizens and ensured that justice will be done."

Oddly, the state Supreme Court recently reversed Rea in a landmark decision affecting civil jury trials. In *Juarez* v. *Superior Court,* 31 Cal.3d. 759 (1982), the court held that the same nine members of a civil jury do not have to agree on all questions to reach an enforceable verdict. In *Juarez,* Rea said, one juror had voted against finding the defendant negligent, on the one hand, but later—as the jury considered comparative negligence—held the defendant was partially at fault.

Heading ABOTA his first year on the bench was "time-consuming but enjoyable," the judge recalled. He loved the work. His first trial, however, was very difficult.

The case concerned a multi-million-dollar trust, and bringing the file to his courtroom took three trips for his clerks. The lawyers—one of them a retired judge Rea used to appear before—told him it would be a short trial because they intended to submit it to him on the basis of depositions.

"And with that, all their heads disappeared under the counsel table and they came out with stacks of depositions." Rea lifted his hand to the level of his chin to show just how tall those stacks were.

To decide the case, Rea had to rule on 10 questions involving issues including breach of contract, breach of a testamentary trust, residual trusts, and the rule against perpetuities. Since he had limited his practice to negligence cases the previous 18 years, he called the master calendar department to see if he could get a simpler first assignment.

The calendar judge said, "No, you keep that one. It'll make a judge out of you." On appeal, Rea noted proudly, he was reversed only on the rule-against-perpetuities question.

The CHAIRMAN. Thank you very much, Senator Wilson. You are nice to take time and come before the committee personally. You could have just endorsed them, but you have gone beyond the call of duty and come here yourself to speak in behalf of these three fine gentlemen.

I want to tell you gentlemen that you are fortunate to have such an able Senator who stands so well with President Reagan and this administration to recommend you for this position to which you have been appointed.

Senator Wilson hasn't been in the Senate too long, but he has already gained the confidence of the Senate and is held in high esteem by the Members of the Senate, and his recommendation of you and his endorsement of you will carry tremendous weight with this committee and the Senate.

Senator, you may remain longer or you may be excused, whichever you prefer.

Senator WILSON. Thank you very much, Mr. Chairman. My other chairman, Senator Tower, who was here before you, is on the floor, as you know, and he has asked that I join him there.

So if you gentlemen will excuse me.

The CHAIRMAN. If you gentlemen will have a seat back there—we will take you up in the order of appearance on the calendar.

First is Judge Hill. I might just swear in all you judges at one time. Would all of you hold up your hand?

[The following persons are sworn: Judge Hill, Judge Billings, Mr. Brewster, Judge Ideman, Judge Rea, and Judge Leisure:]

Judge Hill, if you will come around, we will take you up first.

Judge, do you have any members of your family here?

TESTIMONY OF ROBERT M. HILL, NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT

Judge HILL. Yes; I do, Senator. I have my mother here, Mrs. Hill, and next to her is my wife, Patricia Hill—she serves in the State house of representatives for the State of Texas.

The CHAIRMAN. Is that your wife or your daughter? [Laughter.]

Judge HILL. No; that's my wife, Senator.

The CHAIRMAN You did like I did, you married a young pretty girl [Laughter.]

Is that her sister?

Judge HILL. No; this is my daughter-in-law next to her, Harriet Hill. Then behind her is my daughter, Alicia Thomas. Then my secretary is here—she came up—Martha Johnston. And I have one daughter and a grandson out in the hall. He got a little unruly a minute ago, and we took him out in the hall.

The CHAIRMAN. I see. Well, we are glad to have you with us—glad to have all of you here.

Judge HILL. Sally Davis is her name.

The CHAIRMAN. Judge, if you don't mind—these Senators are so busy—I see Senator D'Amato just came in. If I could let him make a statement about his judge. Senator D'Amato, come right up.

Senator D'Amato is here in behalf of Peter K. Leisure of New York.

Would you like to say a few words in his behalf, Senator?

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. I certainly would, Mr. Chairman. It's always a great pleasure to come before the distinguished chairman of the Judiciary Committee, a man who has done so much to move this country forward and in seeing to it that the judiciary, its selections and also those statutes and laws that you, Mr. Chairman, have worked on to bring about—some thoughtful consideration of the problems that we face today in our society, has done so much—and so I am deeply honored and privileged.

And I am deeply honored and privileged to have the opportunity of presenting to this committee a man who has demonstrated a clearcut capacity to deal with the problems and issues that the important district court in the Southern District of New York, Federal district court, deals with. Peter K. Leisure's record, which you have before you, is ample testimony to his judicial background, his character, his integrity, and, most importantly, Mr. Chairman, we find in President Reagan's nominee a man who makes a very real sacrifice in a very realistic way in taking on this most important position. He is giving once again to his Nation, as he has previously in his service to this Government, by way of taking this position; he leaves a distinguished law firm as a senior partner. The economics of this make a very real sacrifice, but one who knows Peter Leisure knows that his love of the law and service to this Nation will always be uppermost in his mind.

And, Mr. Chairman, I commend him to this committee and for your thoughtful and speedy consideration, as I think that President Reagan has made a magnificent recommendation and nomination in Peter K. Leisure.

The CHAIRMAN. Thank you very much, Senator. I want to thank you for coming here in person and recommending this gentleman. And I want to say that your fine prestige in the Senate will go a long way with the committee and the Senate to have him confirmed.

Senator D'Amato is a comparatively new Senator here, too, and he has made a fine record and is held in high esteem. I know he is busy, and so, Senator, if you wish to be excused, you may, or you can stay, if you care to.

Senator D'AMATO. Thank you so very much, Mr. Chairman.

The CHAIRMAN. Now we will call up Judge Hill first. Without objection, we will place the résumé of Judge Hill in the record.

Judge Hill, you've been a U.S. district court judge, I believe, for the Northern District of Texas since 1970.

Judge HILL. That's correct.

The CHAIRMAN. I am certain that during this period you have witnessed a constant increase in the workload of the court.

Judge HILL. I have, sir.

The CHAIRMAN. All concerned parties seem to agree that this increase will probably continue.

Do you have any recommendations that will be helpful to the committee and to the judicial system to stabilize or decrease this workload? Do the judges need to work longer hours, or just what, in your opinion, needs to be done?

Judge HILL. We do work long hours—I can assure you of that.

Our jurisdiction is greatly expanded, Senator, in the last few years, particularly since I have been on the bench. We have a lot more causes of action that are brought before us now due to, well, legislation enacted by Congress, in many instances, and also prisoners' rights cases and habeas corpus and so forth brought before us.

And standing is an issue—sometimes that has been expanded, to a great extent, since I've been on the bench.

And the suggestions that I have is that a lot of these causes of action that I have had in my court over the past 13 years come out of legislation enacted by Congress, and a lot of that legislation could be best left to the States where the parties could go into State court and have equal rights, perhaps in many instances a better opportunity to express themselves and receive relief in the State courts rather than the Federal courts, where we could spend our time more on what I consider traditional Federal issues.

The CHAIRMAN. Do you think you will enjoy the circuit court better than the district court? To me, the trial in the courtroom has always been an ideal situation for a lawyer, but it's natural that lawyers have ambition to be promoted to a higher court, I guess.

So now you will go up to this high court and sit like a knot on a log and hear these dry appeals, won't you?

Judge HILL. Yes, that's right, that's correct, hear those dry appeals. But I practiced law 20 years and made my living primarily in the trial court, and I have been on the district court for 13½. I think it will be a new experience for me; I think I have the foundation to go before the appellate court and maybe add some district court viewpoint to it, which I think is very important in resolving cases from the appellate level.

The CHAIRMAN. I am sure your experience as a district judge will be of great value to you on the circuit bench.

Judge HILL. It will be.

The CHAIRMAN. You will have the viewpoint of a trial judge as well as a trial lawyer in sitting on the court of appeals.

Now, in 1980, prisoner petitions comprised approximately 14 percent of all U.S. district court litigation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements calling for complete exhaustion of State remedies, time limitations on the filing of petitions, and eliminating magistrates' authority to hold evidentiary hearings.

Do you feel there is a need to alter the degree of access to Federal courts by State prisoners, and, if so, what recommendations in this area would you make? And I might say in that connection that we have passed through the Senate a bill known as habeas corpus that will limit the time anyone tried in Federal court can carry the matter further, to 2 years, and the State courts for 1 year.

We feel that there are too many people now that exhaust all their remedies in the State court, then they go in the Federal court and start all over again, or in the Federal court they want to exhaust all remedies there, which they have a right to do—but we feel there has got to be an end of litigation. We feel the time has come when the dockets are clogged, the judges are busy, and, as I Stated here, these prisoner petitions constituted 14 percent of all U.S. district court civil litigation filings.

And that, to me, appears entirely too high.

And I just wonder if you feel the need that steps should be taken. We are hoping that the House will pass this bill, but I don't know whether it will or not.

Do you think that would help?

Judge HILL. I do, I really do think it would help. That percentage is too high. There should be some limitation or cut-off on these writs of habeas corpus. We don't have them so much from the Federal prisoners as we do from the State prisoners. That is where the big workload comes from, and going back and trying to review those State court proceedings, it makes it very difficult for us. And there should be a cut-off in the number of applications or a time limit within which those applications should be filed.

The CHAIRMAN. Judge Hill, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Judge HILL. That essentially is what it means; it means going beyond the scope of the issues that are brought before the court, and particularly, say, in an individual's case, trying to impose some type of class decree which would affect someone beside that particular individual.

That is essentially what it means, going beyond the scope—and also continuing jurisdiction over cases. We should turn the cases loose once we have decided them and not continue to maintain any degree of jurisdiction over them.

The CHAIRMAN. Judge, I think that is all the questions we have to ask you. I hope you have a successful tenure on the bench, and we will expedite all of these hearings of all you judges as soon as we can The main thing is to get a quorum when we have a meeting here 10 o'clock tomorrow. If we can get a majority of the members to attend this committee meeting tomorrow, we ought to be able to act on your nominations at that time.

I hope you have a happy tenure of service on the Fifth Circuit.

Judge HILL. Thank you, Senator, and I want to thank your staff also for the cooperation they have extended to myself and to my family as well.

The CHAIRMAN. Thank you.

Judge HILL. Thank you very much. I have enjoyed appearing here before you.

The CHAIRMAN. Thank you, sir, glad to see you, and you are now excused. You and your family can remain, or you may depart, whichever you prefer to do.

Our next is Judge Billings of Vermont.

TESTIMONY OF FRANKLIN S. BILLINGS, JR., NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF VERMONT

The CHAIRMAN. Judge Billings, do you have any family members here you would like to introduce?

Judge BILLINGS. No, I don't, Mr. Chairman.

The CHAIRMAN. You are here by yourself.

Judge BILLINGS. I am here by myself.

The CHAIRMAN. Judge Billings, you have had a very distinguished career, I believe, in the judiciary, and at present you are the chief justice of the Vermont Supreme Court and have served in this capacity since 1983, haven't you?

Judge BILLINGS. That's correct, sir.

The CHAIRMAN. What do you feel will be the most rewarding aspect of serving as a district judge, co-judge, for Vermont?

Judge BILLINGS. Well, I served on the trial bench in Vermont for some years, and I have served on the appellate bench, and I really think the challenge is on the trial bench, and I look forward to going back to the trial bench.

I have enjoyed my life on the appellate bench, but I find that the real challenges in disposing of cases, seem to me in the pit, as they might say. And I look forward to deciding cases under the Federal code. I think they are perhaps more intellectually challenging than some of the cases we hear on the appellate court.

The CHAIRMAN. Judge, I consider judicial temperament to be a prerequisite for a Federal judge. I have seen some Federal judges flaunt their power a little too much, I thought, embarrass the jurors and the witnesses and others around the courtroom unnecessarily.

From all I have heard about you, you have a good judicial temperament. I am sure you will exercise your power in the proper manner.

Do you have any thoughts on that subject?

Judge BILLINGS. Well, I think I have over the years. It seems to me that a judge is an impartial referee, impartial to all parties and not taking sides until such time as the matter is there for him to decide after all the evidence is in.

I do not like the judges—I have some in my own State—that get carried away with their own feelings, and I think that is absolutely wrong.

I think my record will stand in good stead as to my temperament in this regard.

The CHAIRMAN. You know, I think that is the main cause of war. If you go way back in history, the dictators we have had, they wanted more power over other people. Genghiz Khan wanted more power, Napoleon wanted more power, Hitler wanted more power, Mussolini wanted more power; now a handful of people in the Kremlin want to rule the world. And if people will avoid trying to grasp too much power. I think the good book, they quoted in one section, that he who would be greatest among you is your servant—Jesus made that statement. And sometimes I wish all the Federal judges would read that.

Judge, do you believe changes in the law should be reserved to the legislature whose members can be altered by the voters if the elected officials fail to effect the values of society?

Judge BILLINGS. I think we have three branches of Government, and the determination of what the statutes and law should be should be left to the legislature, not to the judiciary. The judiciary is there to resolve disputes, and within the law as it is then promulgated and within the evidence that is presented. And we should not go beyond that.

The CHAIRMAN. Some of these Federal judges have taken onto themselves the operation of school districts and hospitals, and taking a lot of power that under the Constitution it would appear to seem to be with the other branches of Government. The legislative body, whether it's the State or the national level, makes the law; the executive branch administers and enforces the law; the judicial branch interprets the law.

And if all of these people would adhere to their jurisdictions, we would probably get along better. Sometimes they don't. For instance, Mr. Truman seized the steel mills. The Supreme Court struck down his order and made him return the mills to the owners. This Congress sometimes passes laws that go beyond their jurisdiction, I think.

So if we can just keep that separation there in perspective, it would be a great help.

Judge **Billings**. I would agree.

The **Chairman**. I think that's all the questions I have to ask you. I want to congratulate you on your appointment by President Reagan, and also your recommendation by Senator Stafford and your confirmation here by both of your Senators. I hope you have a happy service on the bench.

Judge **Billings**. Thank you, Mr. Chairman. And I appreciate the cooperation of your committee staff.

The **Chairman**. So you are now excused. I want to ask unanimous consent that this résumé of Judge Billings be placed in the record prior to the questions I have just propounded.

Next is the three California judges—if you will come up. I will just make an emergency call, so we will take a recess for 5 minutes.

[Brief recess.]

The **Chairman**. The committee will come to order. We will now have the three gentlemen from California, and I have prepared some questions for them.

Let's see, I believe Mr. Brewster is first.

TESTIMONY OF RUDI M. BREWSTER, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA

The **Chairman**. Mr. Brewster, I believe a great many of these appointees around here are judges—I don't believe you are a judge, are you?

Mr. **Brewster**. That's correct, Senator, I am the only one who is not, apparently, today.

The **Chairman**. Feel kind of lonesome?

Mr. **Brewster**. Yes, I do. I am wondering what I am doing here.

The **Chairman**. Well, we congratulate all of you on your appointment by President Reagan, and congratulate all of you on being recommended by Senator Wilson, and Senator Cranston, I believe, doesn't object to your appointments.

I have a few questions here to propound.

Mr. Brewster, how would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator or was not prepared to adequately represent the interests of his or her client?

Mr. **Brewster**. Well, that's a serious matter. There are precedents that would suggest that such a trial could be in jeopardy. I think what I would do would be to call counsel into chambers on both sides, on all sides, discuss the problem with them and see if raising the problem is enough that they will come up with a suitable suggestion, such as associating competent counsel with the one who is having the problem.

But if they don't come up with a solution and if I did truly feel that the defendant was represented by incompetent counsel, I would take steps to see that counsel is appointed in association with the attorney so that the trial could proceed in a constitutional way.

The CHAIRMAN. Now, what in your opinion is needed to speed up the disposition of Federal cases? More judges, magistrates, or changing the criminal procedure, judges working longer hours? The dockets seem to be clogged. What do you feel can be done?

Are you willing to work longer hours if you are appointed a district judge?

Mr. BREWSTER. Senator, I am looking forward to it. I have a history of long hours. My wife can testify to that, if you want to put her under oath.

The CHAIRMAN. I was a circuit judge in South Carolina before I became Governor, and I am convinced that these judges can clear up these dockets if they are just willing to work a few hours longer till they get them cleared up. And once they get them cleared, they ought to be able to keep them clear.

Do you have any other suggestions on that?

Mr. BREWSTER. Well, sir, that may be partly true. I can't say that, because I don't know that much about the workload of judges, being a practicing lawyer myself. But I do think that the workload of the Federal bench is heavily affected by the litigious nature of our society. The legislatures, the Congress, every year enact many, many measures which require, many times, litigation. They enact new rights, and people—without Congress, people are becoming more litigation-minded. It seems like today that the solution for everything is to sue somebody.

And the courts, I feel, especially Federal courts, should make heavy use of rule 56, summary judgment proceeding. There may be other changes in the way of Federal magistrates that I am not that conversant with at this time. But I don't think there is any one solution; I think it will be a combination of all of those elements that the Senator has mentioned—working together is the only way we are going to make any headway.

But I don't think that creating new levels of courts is really the solution, because it will just magnify the problem even more.

The CHAIRMAN. Mr. Brewster, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its decrees or orders?

Mr. BREWSTER. This was mentioned earlier. I am not a trained hospital administrator and I am not a school principal, and I would shudder at the thought of having to administer a hospital from the bench, or a school system. I feel that the courts are there to settle cases and controversies that are brought before it.

If it is necessary to have that kind of expertise available, then I feel that the industry involved should use their own people and report to the court through a master—but let the industry run the business. I am not competent to run a hospital nor a school system, and I don't think the courts should get involved in that if they can possibly avoid it.

The **Chairman**. I think that's all the questions I have for you And if you wish to leave, you are now excused, or you can remain, if you care to. And I wish you a happy service on the bench.

Mr. **Brewster**. Thank you, Senator. I want to thank you and the committee for the courtesies that have been extended to me, and I will sit in the back of the room and wait until the meeting is over.

The **Chairman**. I would like all of these résumés to appear in the record.

Next is Judge Ideman.

The **Chairman**. Now, Judge Ideman, in reviewing your file, I noticed that you graduated from the Citadel in 1953.

TESTIMONY OF JAMES M. IDEMAN, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Judge **Ideman**. Yes, Mr. Chairman.

The **Chairman**. I was Governor 1947 to 1951. You came a little after that. You are just a young man, aren't you?

You are to be congratulated for selecting such a fine college.

Now, Judge, you have served on the Los Angeles Superior Court since 1979, I believe.

Judge **Ideman**. Yes, that is correct, Mr. Chairman.

The **Chairman**. Is that the highest trial court in the State?

Judge **Ideman**. Yes, it is.

The **Chairman**. It has the power of death in criminal cases?

Judge **Ideman**. That is true.

The **Chairman**. Unlimited jurisdiction in civil cases?

Judge **Ideman**. That is also true.

The **Chairman**. What do you feel would be the most rewarding aspect of serving in the position of a Federal district court judge rather than in your present capacity?

Judge **Ideman**. Two reasons primarily, Senator. I look forward to the diversity and complexity of the matters that would be brought before me, as a professional challenge and intellectual challenge. And I look forward also to serving my country in a position of great responsibility as a Federal district judge.

The **Chairman**. Of course, it's not too bad for you to draw full salary after you retire either, is it?

Judge **Ideman**. True enough

The **Chairman**. Judge, would you give us your views on penalties for second- or third-time drug dealers?

Judge **Ideman**. Mr. Chairman, in my 20 years in the criminal justice business—15 years as a prosecutor and 5 years as a trial judge—I have seen first hand the terrible damage that professional drug dealers are doing to the people of this country. It's not just that they are providing drugs, but they are also providing a basis for, some say, most of the crime that occurs in this country—murder, armed robbery, burglary, even sex crimes.

And I think that the judiciary has a duty to treat severely those people who continue to offend in that regard.

The **Chairman**. I don't know of any more harm that is being done by our population than by drug dealers. We had a hearing here several years ago, and it brought out the fact from these experts that these drugs bring about deterioration in the brain, and even marijuana smoke for a great length of time there causes permanent damage to the brain.

Evidently a lot of these young people and others don't seem to understand how much damage drugs can do. I think our schools have got to do more in educating the young people about the dangers of these drugs. I think they have got to have more moving pictures and films to show this damage. That seems to impress them more than just listening to a talk by someone. And they may have to bring in some people who have been damaged and let them tell their story. There are a number of them who can come in and just tell how it's affected them.

Judge, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Judge IDEMAN. Senator, it's been my experience that many judges who think they feel a conflict between their conscience and the clear import of the law actually have a philosophical difference with the law; they would have the law be otherwise if they were in a position to change it—as a legislator they would change it. But they let the two positions slide into one another, they let their legislative preference slide over into their judicial duties.

I think where the Constitution or the statutory law is clear that it is the duty of a trial judge to follow that law, and set aside his own personal views, if we really are to have a government of laws and not of men.

The CHAIRMAN. I'm glad you take that position. I wish more people on the bench did feel that way.

I believe that's all the questions I have for you, and I wish you a happy service on the bench.

Judge IDEMAN. Thank you, Mr. Chairman, and I also would like to extend my thanks to the members of the committee and your staff—Mr. Short and Mrs. Joy have been particularly helpful to us, and we appreciate it very much.

The CHAIRMAN. You are now excused, if you wish to leave, and you can remain, if you care to.

Judge IDEMAN. I will remain until my colleague from our court has had his turn.

The CHAIRMAN. Now we are going to come to you, Judge Rea.

TESTIMONY OF WILLIAM J. REA, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Judge REA. Yes, sir.

The CHAIRMAN. Judge Rea, you have served as a judge, I believe, on the Los Angeles Superior Court the same as Judge Ideman, have you?

Judge REA. Yes.

The CHAIRMAN. It's a similar court, isn't it?

Judge REA. Yes, Senator, that is correct.

The CHAIRMAN. And you have served there since 1968?

Judge REA. In December 1968 I was appointed by then Governor Reagan to the superior court.

The CHAIRMAN. I am confident that you are knowledgeable of the State laws. I wonder if you foresee any difficulty in the transition from the State to the Federal bench?

Judge REA. I personally do not feel there will be any great problem for me. I think our evidence code in California rivals that of the Federal rules. As far as civil cases are concerned, there will be a new arena of law for me to learn in the specific fields of patent and antitrust and things of that kind. But I feel that it will be a learning process that I welcome, and I don't anticipate having any problems.

I have been a trial judge over all of the years that I have been on the superior court bench, and I have had some administrative experience as well inasmuch as I was the supervising judge of the northwest district of Los Angeles superior court, and there were 15 judges that I had serving under me in that capacity.

The CHAIRMAN. Your experience as a State trial judge should be of great value to you as a Federal trial judge.

Judge REA. Yes, sir, I think it will be.

The CHAIRMAN. Would you give us your opinion on the suggestion that attorneys should undergo special training before being allowed to practice in the Federal courts? Is that necessary or not?

Judge REA. Well, I have ambivalent feelings about that, having been an attorney for some 18 to 20 years before I assumed the bench. I can see that there are arguments on both sides. You like to have competent counsel before you; it makes your task much easier.

On the other hand, the attorneys do have to learn, and they only learn really through practical experience and by trying cases. I am certainly in favor of some type of a screening process, so that perhaps you can weed out, so to speak, the ones that are totally unprepared and incapable of coming to the court to try their case. However, I think there should not be any limitation upon young lawyers who wish to gain the experience by actually trying the case.

The CHAIRMAN. Judge, are there any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of the provision or its surrounding legislative history?

Judge REA. No, sir, I am a believer in the separation of powers. I think the judiciary has its function and the legislature has its function, and I don't think that one should intrude upon the other.

The CHAIRMAN. Well, I want to wish you a successful tenure on the bench, and think you will find it very rewarding to continue in the trial of cases, which I always found so interesting.

Judge REA. Thank you, Senator.

The CHAIRMAN. You are now excused, and you can remain or you can depart.

Judge REA. Thank you, Senator, and I also wish to extend my thanks to your committee and to your staff for their courtesies to me and to my family.

The CHAIRMAN. Now, our last nominee is Peter K. Leisure.

TESTIMONY OF PETER K. LEISURE, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

The **Chairman**. Mr. Leisure, do you have any members of your family here with you to introduce?

Mr. **Leisure**. Unfortunately not; I am here alone today, Senator.

The **Chairman**. All right. Mr. Leisure, you served as an assistant U.S. attorney, I believe, in the Southern District of New York for approximately 4 years, is that correct?

Mr. **Leisure**. That's correct.

The **Chairman**. Do you feel this experience will be beneficial to you as a Federal judge, and, if so, how?

Mr. **Leisure**. Well, I served, Senator, actually in the criminal division, so that during that period of time I gained a great deal of experience in the criminal cases. Since then I have handled between 20 and 30 percent of my time in criminal matters, so that I feel the over 4 years I was an assistant U.S. attorney, handling criminal cases, that the experience in a condensed fashion was a very valuable one and will stand well for me as a judge presiding over criminal cases at this time.

The **Chairman**. Mr. Leisure, would you please tell the committee how you would resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern?

Mr. **Leisure**. Well, as far as potential or actual conflicts of interest, I intend, Senator, to be scrupulously careful to avoid any actual conflicts of interest. As far as the potential one is concerned, I would want to hear from the parties involved and I would want to State my position. If it was in a gray area, I might very well seek the advice of one of the senior judges until I am more experienced.

But I would want to avoid any appearance of impropriety as far as the public was concerned.

The **Chairman**. Mr. Leisure, where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Mr. **Leisure**. Well, I think, generally speaking, Senator, that the judge should be impartial and fair and objective in his approach, but he should try the case that is before him, and it should be limited to that, because it is up to the legislature to legislate, and when the opportunity comes to interpret legislation—I think the judge really should be interpreting as far as the legislature intended it to be interpreted, as opposed to how the judge in a subjective way might be thinking.

And I intend to judge in that fashion.

The **Chairman**. I don't presume you would ever be tempted to usurp the authority of other branches of government at the Federal level.

Mr. **Leisure**. I would not, Senator, and I haven't respected those judges that have.

The CHAIRMAN. Or usurp the authority reserved to the States under the Constitution.

Mr. LEISURE. Yes, that is correct.

The CHAIRMAN. I get very frustrated when I hear about some Federal judges undertaking to control State activities and State institutions and things of that kind, and I don't think that was ever intended that that would be the case under our Constitution.

Mr. LEISURE. That is correct, Mr. Chairman.

The CHAIRMAN. I don't think I have any other questions. I hope you have a happy service on the bench. And we will try to get these nominations up at the committee meeting tomorrow, if possible.

Mr. LEISURE. Thank you so much, Senator, and I also wish to thank the other Members of your committee, as well as yourself and Mr. Short and Sheila Joy of the Department of Justice for all the courtesies extended to me.

The CHAIRMAN. Thank you.

[The committee adjourned at 3:21 p.m.]

BIOGRAPHIES

ROBERT M. HILL

NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT

Birth: January 13, 1928, Dallas, TX.

Legal residence: Texas.

Martial status: Married to Patricia Porcella Hill, 3 children.

Education: 1944-50—University of Texas, B.B.A. degree, LL.B. degree.

Bar: 1949—Texas.

Experience: 1950-52—Law firm of R.T. Bailey, Dallas, TX, Associate; 1952-55—Caldwell, Baker & Jordan, Dallas, TX, associate; 1955-58—Caldwell, Baker, Jordan & Hill, Dallas, TX, partner; 1959-70—Woodruff, Hill, Kendall & Smith, Dallas, TX, partner; 1970 to present—U.S. district judge, Northern District of Texas.

FRANKLIN S. BILLINGS, JR.

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF VERMONT

Birth: June 5, 1922, Woodstock, VT.

Legal residence: Vermont.

Marital status: Married to Pauline Richardson Gillingham, 4 children.

Education: 1940-43—Harvard University, S.B. degree; 1944—Yale Law School; 1945-47—University of Virginia Law School, L.L.B. degree.

Bar: 1948—Vermont.

Experience: 1983 to present—Chief justice, Vermont Supreme Court; 1975-83—Associate justice, Vermont Supreme Court; 1966-75—Superior court judge, State of Vermont; 1955-63—Municipal judge (part-time), Hartford district; 1952-66—Billings & Sherburne, Woodstock, VT, partner; 1949-52—Private practice, Woodstock, VT; 1948-49—Law Office of Alfred A. Guarino, White River Junction, VT, associate.

RUDI M. BREWSTER

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF CALIFORNIA

Birth: May 18, 1932—Sioux Falls, SD.

Legal residence: California.

Marital status: Married to Gloria Nanson Brewster, 3 children.

Education: 1950-54—Princeton University, A.B. degree; 1957-60—Stanford University Law School, J.D. degree.

Bar: 1961—California.

Military service: 1954-1957—United States Navy.

Experience: 1960 to present—Gray, Cary, Ames & Frye, San Diego, CA.

JAMES M. IDEMAN

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: April 2, 1931, Rockford, IL.

Legal residence: California.

Marital status: Married to Gertraud "Susie" Krahnert Ideman.

Education: 1949-53—The Citadel, B.A. degree; 1957-58, 1960-63—University of Southern California Law School, J.D. degree.

Bar: 1964—California.

Military service: 1953-56—U.S. Army.

Experience: 1979 to present—Judge, Los Angeles Superior Court; 1964-79—Deputy district attorney, Office of the District Attorney, Los Angeles, CA; 1963-64—Law clerk, Honorable McIntyre Faries, presiding judge of Los Angeles Superior Court.

WILLIAM J. REA

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: Feb. 21, 1920, Los Angeles, CA

Legal residence: California.

Marital status: Married to Catherine Douden Rea, 1 child.

Education: 1938-39—University of California; 1939-42—Loyola University, Los Angeles, CA, B.S. degree; 1946-1949—University of Colorado, LL.B. degree.

Bar: 1951— California.

Military service: 1941-46—U.S. Navy.

Experience: 1950-51—Claims representative, Farmers Insurance Group; 1951-64—Early, Maslack, Foran & Williams; 1964-68—Moore, Graves, Madory & Rea; 1968 to present—Judge, Los Angeles Superior Court.

PETER K. LEISURE

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

Birth: March 21, 1929, New York, NY.

Legal residence: New York.

Marital status: Married to Kathleen Blair Leisure, 3 children (1 deceased).

Education: 1948-52—Yale University, B.A. degree; 1952—Columbia University; 1955-58—University of Virginia Law School, L.L.B. degree.

Bar: 1959—New York.

Military service: 1953-55—U.S. Army.

Experience: 1978 to present—Whitman & Ransom, New York, litigation partner; 1966-78—Curtis, Mallet-Prevost Colt & Mosle, New York, litigation partner, associate (1966-67); 1962-66 U.S. Attorneys Office, New York, Assistant U.S. Attorney; 1958-61 Breed, Abbott & Morgan, New York, associate.

CONFIRMATION HEARING ON:

CHARLES A. LEGGE, MARCEL LIVAUDAIS, JR., AND ILANA DIAMOND ROVNER

TUESDAY, JUNE 26, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met at 4:30 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Robert J. Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We have met this afternoon for the confirmation of certain judges. The first is Charles A. Legge of California to be U.S. district judge for the Northern District of California. I see the distinguished and able Senator from California here to recommend Judge Legge.

Senator Wilson, we would be pleased to hear from you.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator Wilson. Thank you very much, Mr. Chairman.

I appreciate the opportunity to appear here today before the committee.

I have the honor to introduce to you the nominee of the President of the United States for appointment to the U.S. District Court for the Northern District of California, Mr. Charles A. Legge.

Before I proceed to detail to you briefly the impressive qualifications of this candidate, I would like to note that this is the fourth time I have been before your committee this month, and I make this point simply to draw attention to the fact that California's Federal courts have been in need of some attention, and we are very grateful to this committee for assisting so ably and with such care and such speed to fill the vacancies and, therefore, allow those courts to discharge their burden as expeditiously as possible. I speak for each of the presiding judges on the panels and express my gratitude to the chairmen and the committee.

I also bring you the good news I anticipate no further appointments this year.

Again I express my great appreciation for the cooperation from this committee.

I brought Mr. Legge's name and credentials to the attention of the President following careful study by my Judicial Qualifications Committee in California which has found Mr. Legge to be deserving of the highest rating which they will give, that of exceptionally well qualified.

I am most grateful to the President and officials within the White House and Department of Justice for affirming my choice through their independent investigation.

While pleased, I am by no means surprised, because Charles A. Legge is known as a superb attorney who has specialized in business and financial litigation. Indeed, he is widely recognized as one of the ablest, most skilled litigators in the State of California.

Mr. Legge earned his undergraduate and graduate degree from Stanford University, his baccalaureate with distinction, and his juris doctor while on the board of editors of the Law Review. Today he is a member of Stanford's board of visitors.

He and his family make their home in Orinda, an East Bay area suburb. He is now a senior partner of Bronson, Bronson & McKinnon, a prominent San Francisco law firm, which he joined in 1956, following a tour of duty in the U.S. Army.

In recognition of his outstanding abilities, Mr. Legge's peers elected him to the American College of Trial Lawyers which, as the committee knows, is considered a most prestigious legal organization. He has been an active member of the California and San Francisco bar associations and the ABA, and has chaired a number of their committees. Specifically with respect to the ABA, he has served on the antitrust section, the corporation business and banking section, and the legal economics section. He is also a fellow of the American Bar Foundation.

For the California Bar Association, he has served as the past chairman of the Committee on Administration of Justice. He has been a member of a number of other committees.

Perhaps the most significant memories he has in connection with the long and distinguished legal career has been the role he played in two of his most prominent cases where he served as lead counsel for the Federal Deposit Insurance Corporation in the collapse of two national banks, the National Bank of San Francisco, and the U.S. National Bank in San Diego. His task was to unravel their tangled financial dealings and restore some order, as much as possible for creditors.

His pro bono publico work has included two indigent criminal cases taken to the U.S. Supreme Court.

He has been a distinguished teacher of the law. He has written numerous articles for the State bar's continuing legal education program.

In short, Mr. Chairman, and I am capsuling a great deal, Charles Legge is not only well known to legal practitioners throughout California, but he enjoys an enviable reputation for high character, for judicial temperament and precise legal thinking, and I am confident that the committee, as they conduct their examination, will share the assessment of my own screening committee and find him in fact to be exceptionally well qualified.

Therefore the only thing left for me is to thank you and to urge the committee's approval. I feel that you will share my conviction as well as that of this administration, that the people of California and the Nation can benefit enormously from Charles Legge's services because of the qualities he will bring to the Federal bench. I think he is a superbly qualified candidate for the job and, as you will learn from your examination of him, he is ready, willing and able to serve. For these reasons, he has my unqualified endorsement.

The CHAIRMAN. Thank you very much, Senator Wilson.

Mr. Legge is to be congratulated for having such a respected Member of the U.S. Senate from California to recommend him so highly.

Senator WILSON. Mr. Legge is accompanied by his wife, Jan, and his daughter.

The CHAIRMAN. If they will stand, we will recognize them.

Do you have any friends you want to introduce?

Mr. LEGGE. No, sir. Just my family today.

The CHAIRMAN. Senator Wilson, I know how busy you are. You are welcome to stay, or if you wish to leave, you may do so.

Senator WILSON. I would be pleased to stay. I would like to be present. However, as the chairman knows, I have to get back to conference.

The CHAIRMAN. I know you are a member of the Armed Services Conference, and it is not often that a junior member gets on that conference. I want to commend you for that too. That is another indication of the high esteem in which you are held here in the Senate.

Senator WILSON. Thank you, sir.

The CHAIRMAN. If you will keep your seat, we will swear all three of you at the same time.

Hold up your right hand and be sworn.

Do you swear that the testimony that you are going to give in this hearing today will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. LEGGE. I do.

Mr. LIVAUDAIS. I do.

Mrs. ROVNER. I do.

The CHAIRMAN. Mr. Legge, without objection, we will place a brief resume in the record.

TESTIMONY OF CHARLES A. LEGGE, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA

The CHAIRMAN. You have been a practicing attorney since 1956, Mr. Legge?

Mr. LEGGE. Yes, Mr. Chairman.

The CHAIRMAN. Now you have been nominated for the position of U.S. district judge.

What do you feel will be the most rewarding aspect of serving in this capacity?

Mr. LEGGE. There is, first of all, the element of public service, to give back to the profession that which we practicing lawyers take from it for our well-being and that of our clients.

I think the most important factor is the opportunity to be involved in the administration of justice in a way that I can do what I think is right and what I think is correct, instead of simply acting for the best interests, however fine they may be, of a particular client.

The CHAIRMAN. Would you please describe the arrangements you have made to dissolve the financial interests you have made in your law practice?

Mr. LEGGE. If confirmed by the Senate, I will resign from my law firm effective about September 1, and withdraw from the practice.

At that time, the firm will owe me certain moneys with respect to capital and other interests which will be paid out over a period of years.

The CHAIRMAN. Counsel has advised it would be several years.

Mr. LEGGE. It is possible, subject to negotiation, probably 3 to 5 years.

The CHAIRMAN. Of course now, that is just cases you have on hand that you have not yet finished, is that correct?

Mr. LEGGE. It does not quite work that way, Mr. Chairman. At the point of withdrawing from the firm, all interests are set. I would retain no interest in cases for the future. There is simply a determination of my financial interest as of that moment, and that is what is paid out over a period of time. During the period of the payout, I will handle no work that involves my firm.

The CHAIRMAN. As I understand, from the time you take your oath as a judge, that will end any financial interests you would receive in other cases?

Mr. LEGGE. That is right. The financial interests will be determined at that moment.

The CHAIRMAN. You will receive an agreement reached upon the caseload at that time?

Mr. LEGGE. That is right. It is accounts receivable and hours in process at that time.

The CHAIRMAN. When I came to the Senate, I had a similar situation. When I took my oath and left the firm, I received nothing out of it.

Mr. LEGGE. That is exactly it.

The CHAIRMAN. Mr. Legge, I have always felt judicial character was a very important quality of a Federal judge since I have seen some Federal judges flaunt their powers and embarrass lawyers and jurors and witnesses and others.

How do you feel about that?

Mr LEGGE. I agree with you, Mr. Chairman. The essence of the judicial process should be one of fairness and the appearance of fairness and evenhandedness. If I might add, I think I have been well trained by virtue of being a chairman of a firm of 55 partners, each of whose interests have to be negotiated and discussed during the course of the year.

The CHAIRMAN. I am very interested in judicial activism. We have known some judges who tried to take over the running of school districts and other State institutions which, in my judgment, is a matter better left to the States. And I am a strong believer that the Constitution means what it says.

We have the three branches of power here and you have the division of power between the States. The States under the Constitution have all of the powers not delegated to the Federal Government since it was written. Do you agree with that?

Mr. LEGGE. Yes, I certainly do, Mr. Chairman.

The CHAIRMAN. What are the standards you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. LEGGE. First of all, I would imagine such instances would be extremely rare. The only instances I have observed have been compliance of temporary restraining orders and preliminary judgments, and any judgment would be exercised conservatively. One would have to start with the Constitution, the acts of Congress, and interpret the law in order to accomplish results and not infringe upon the jurisdiction of other bodies.

The CHAIRMAN. Mr. Legge, you seem well-qualified to become a U.S. district judge, and I hope you enjoy your tenure on the bench. You are now excused or you may remain if you care to do so.

Mr. Livaudais, we will take you next. I believe you are a U.S. magistrate now.

TESTIMONY OF MARCEL LIVAUDAIS, JR., NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF LOUISIANA

Mr. LIVAUDAIS. Yes, Mr. Chairman.

The CHAIRMAN. You have been a U.S. magistrate since 1977?

Mr. LIVAUDAIS. Yes.

The CHAIRMAN. And you believe U.S. magistrates are being properly utilized. And do you have any recommendations for improvements in the system?

Mr. LIVAUDAIS. The system is working well, and we are being well utilized. And if they are not utilizing the magistrates, at least in my district in Louisiana, we are being utilized to the fullest, and it is a big help to the courts. I would hope the other districts would do the same thing.

The CHAIRMAN. Federal law now permits U.S. magistrates to try civil, jury, and court cases with the approval of the parties and the district judges.

In your experience, are the majority of U.S. magistrates certified as competent to act in the capacity as district judges in these cases?

Mr. LIVAUDAIS. Yes, generally.

The CHAIRMAN. In your experience, has this generally been the case?

Mr. LIVAUDAIS. In my Eastern District of Louisiana, they are.

The CHAIRMAN. Do you feel there is a need for judges to assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Mr. LIVAUDAIS. Yes, Mr. Chairman, it is my responsibility. I do not want to see anyone else do it. I would want that to be the case.

The CHAIRMAN. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Mr. LIVAUDAIS. Mr. Chairman, I learned about the Justinian Code in my first days in law school. The Louisiana Civil Code states that law is a solemn expression of legislative will. You cannot ignore the statute. You interpret the law. You do not make the law. And I perceive my function as a judge is to administer the law and interpret it.

The CHAIRMAN. A great many times I guess judges are tempted because the law is not what it should be and maybe they have attempted to do what is right. Strictly speaking, the law is made by State Legislators and State courts and by the Congress and the Nation, and the judges are bound by the law as made. I would trust you were thinking along those lines?

Mr. LIVAUDAIS. Yes.

The CHAIRMAN. Do you have any members of your family here whom you would like to introduce?

Mr. LIVAUDAIS. No, sir. I note Senator Johnston's aides were present in the room.

The CHAIRMAN. Senator Johnston sent a statement in the event he could not get here, and also Senator Long has also expressed an opinion to endorse you.

I believe we have a statement here by Senator Russell Long.

I know you are pleased to have their endorsement, and I congratulate you upon your appointment.

We will place in the record the statements of Senators Long and Johnston.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR RUSSELL B. LONG

Mr. Chairman and Members of the Committee, I am very pleased to appear before the Committee today to introduce to you the Honorable Marcel Livaudais, Jr., nominee for United States District Court for the Eastern District of Louisiana. I recommend him very highly.

Judge Livaudais is presently serving as a Magistrate for the Eastern District Court in New Orleans, Louisiana. He is a graduate of Tulane University Law School in 1949, and a graduate of Tulane University in 1945.

Judge Livaudais served in the Navy from 1945 to 1946 and from 1950 to 1952. Upon Graduation from Tulane Law School, he joined the highly respected law firm of Boswell and Loeb, as an associate in 1949. In 1956, he became a named partner in this firm.

Judge Livaudais is a member of the Louisiana Bar Association and has been president of the New Orleans Bar Association.

Because of his distinguished years of service as a United States Magistrate and previously as a practicing attorney, Judge Livaudais is very well qualified to perform the duties of United States District Court Judge and I strongly urge you to approve his nomination.

PREPARED STATEMENT OF SENATOR J. BENNETT JOHNSTON

Mr. Chairman and Members of the Committee, I am very pleased to appear before the Committee today for the purpose of introducing to you Mr. Marcel Livaudais, Jr. of New Orleans, Louisiana, nominee to the United States District Court for the Eastern District of Louisiana.

Mr. Livaudais received his Bachelor's degree and law degree from Tulane University in 1945 and 1949, respectively.

Mr. Livaudais has served his country loyally and well. Upon graduation from college, Mr. Livaudais served in the United States Navy for three years.

After graduation from law school, Mr. Livaudais joined as an associate with the law firm of Boswell & Loeb in New Orleans, Louisiana. In 1977, he withdrew from the private practice of law in order to assume the duties as United States Magistrate in New Orleans.

Mr. Livaudais has been very active in community and civic affairs. He is a member of the Louisiana Bar Association and a former President of the New Orleans Bar Association.

Because of his distinguished career, Mr. Livaudais has been highly recommended by his colleagues and mutual friends to serve as a Judge to the United States District Court for the Eastern District of Louisiana. I strongly urge you to approve his nomination.

The CHAIRMAN. Thank you.

You may remain or you may leave, whichever you prefer.

We now move on to the nomination of Mrs. Ilana Diamond Rovner.

Mrs. Rovner, I read an article in the newspaper about Senator Percy appointing you. It is a very interesting article. It seems you have had quite a few interesting experiences elsewhere over your lifetime.

I want to congratulate you for all that you have been able to come through and still survive and still have that spirit.

I also want to say this is probably the only country in the world—I note you were born in Latvia—I believe where, in such a short period of time, you have been appointed to a high position. It shows America is the land of opportunity.

Mrs. ROVNER. You mirror every sentiment I have, Mr. Chairman.

The CHAIRMAN. I noticed Senator Percy just came in. I mentioned he nominated you. I know, as chairman of the Foreign Relations Committee, he is one of the busiest men around the Capitol, and he is most highly respected.

If you do not mind, we will hear from him, and then we will come back to you.

STATEMENT OF HON. CHARLES H. PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator PERCY. Thank you, Mr. Chairman. I appreciate it a great deal.

I would like the privilege of introducing to you, Mr. Chairman, Mr. and Mrs. Berger from Alton, IL. We have just come from making a presentation to the President.

This gentleman has founded organizations all over the country for veterans.

I know you would want to meet Mr. and Mrs. Berger.

The CHAIRMAN. We are very pleased to have you with us.

Senator PERCY. You will have to attribute any tardiness to the President.

The CHAIRMAN. Do you have any family members you would like to introduce before we start?

Mrs. ROVNER. Thank you very much.

I am honored to be able to introduce my parents, Mr. and Mr. Stanley Diamond.

The CHAIRMAN. We are very pleased to have you with us.

Mrs. ROVNER. My husband, Dr. Richard Rovner, and our son, Max Rovner. Our son is the taller of the two.

I would also like to introduce my truest friend from Georgetown Law School, Mr Neal Gillen, and my coworkers, Ellen Craig, Gayle

Cozens, Patrick Baikauskas, and, our friend, Mr. Bruce McCarthur. Thank you.

The CHAIRMAN. We are very pleased to have all of you here. She was calling out those names without even any notes.

Senator Percy.

Senator PERCY. Mr. Chairman, I am filled with pride and great pleasure at the honor of introducing to you Ilana Diamond Rovner who has been nominated by the President to fill the vacancy on the U.S. District Court for the Northern District of Illinois. Mrs. Rovner is a remarkable person who has led a remarkable life, which she shared with her parents and her friends, which has really become legend in the State of Iliinois and Chicago, and she has been a great example for many people.

She is, in many ways, an example of America at its very best. She and her family were refugees from Latvia in 1938. They struggled through times of poverty to rebuild their lives here, becoming successful participants and leaders in the American capital system.

Ilana, for her part, graduated from Bryn Mawr College and Chicago Kent College of Law. She then took up her second career as wife and mother before becoming law clerk to former Chief Judge James Parsons of the U. S. District Court for the Northern District of Illinois. After more than a year as the chief judge's clerk, Mrs. Rovner became an assistant U.S. attorney in Chicago. There she earned a reputation as an active and aggressive prosecutor.

Following that service, our former U.S. attorney, and then Governor of Illinois, Jim Thompson, convinced Mrs. Rovner to join his administration as legal counsel and Deputy Governor, which she has done since 1977.

As I looked for candidates to fill the vacancy on the district court, I was delighted by Mrs. Rovner's willingness to be considered and to find such extremely high regard for her in the Illinois legal community. I was convinced that she would continue to uphold the tradition of excellence we now have on the northern district court and was proud to recommend her nomination to the President.

In editorializing on Ilana Rovner's nomination this past weekend, the Chicago Sun-Times began: "President Reagan picked a real winner in appointing Ilana Diamond Rovner to a U. S. district court vacancy here."

Mr. Chairman, I could not agree more, and I take great pleasure in introducing her to you and this committee, and for your consideration and the consideration of the Senate.

The CHAIRMAN. Thank you very much, Senator. With your fine endorsement and recommendation of her, I am sure she will sail right through.

We thank you for your appearance. It is an honor to have the distinguished senior Senator here to recognize you so highly. It is of inestimable benefit.

Thank you, Senator Percy.

TESTIMONY OF MRS. ILANA DIAMOND ROVNER, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

The CHAIRMAN. Mrs. Rovner, you are presently the Deputy Governor for Chicago and legal counsel to the Governor of Illinois.

Prior to that, you served as assistant U.S. attorney for the Northern District of Illinois.

Do you feel this experience will be beneficial to you as a district court judge and, if so, how?

Mrs. Rovner. I think it will be beneficial.

I was fortunate enough to have been an assistant U.S. attorney in the very same district which, if I am confirmed by the Senate, I will sit, and I think I have an understanding of that court, the way the court runs, and the management of the court.

I was very fortunate in being chief of the only division in the U.S. attorney's office that prosecuted both civil and criminal cases. I have an understanding of civil and criminal procedure which would hold me in very good stead.

The Chairman. Have you had any experience in the Federal courts?

Mrs. Rovner. Yes, Mr. Chairman, I have.

The Chairman. In October 1982, you were appointed as 1 of 15 members to the Performance Assistance Committee for the Northern District of Illinois. This committee, I believe, was established by the judges of the Federal district court to assist members of the bar to achieve a higher level of adequate trial performance.

Would you tell the committee what action this special committee took, and any recommendations you developed that might be utilized by other jurisdictions?

Mrs. Rovner. The committee was set up in response to the Chief Justice's admonition to the trial bar of this country. As Judge Burger so aptly stated, there has been some incompetence among trial lawyers; the committee, unfortunately, has not been able to accomplish as much as we would have liked to have seen accomplished. That is because many of the lawyers in the district view the committee as a punishing mechanism rather than that which it actually is, an assistance mechanism. And both the bench and the bar have been somewhat loathe to refer attorneys to the committee.

The way in which it works is that in order to become a member of the trial bar, a lawyer must earn four qualifying units which would include two units of trial litigation experience and two units of simulation or observation work. We have a long way to go with this committee, to be perfectly honest with you, Mr. Chairman.

The Chairman. Mrs. Rovner, you informed the committee on the statement that you filled out that the role of the judiciary is to determine what the Constitution and our body of laws requires when applied to a specific factual situation and to render a decision based on these facts.

Are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Mrs. Rovner. It is never appropriate for a judge to usurp the legislative function. I think the genius of the framers of the Constitution was their understanding of how important the doctrine of separation of powers is. The framers could never have known about modern society and what modern society would entail, but what the framers did understand was man's desire for power, and they understood how important it was to have a doctrine of separation of powers.

The CHAIRMAN. Where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Mrs. ROVNER. I think that a judge's responsibility is to determine what the Constitution and body of laws say about a given set of facts before that judge and to then fashion a remedy, and the remedy that he mentioned must always be the narrowest remedy available.

The CHAIRMAN. I thank you. Those are all the questions I have at this time.

Again I congratulate you on becoming an American citizen and upon being appointed to such a high position. And, young lady, I wish you success and happiness on the bench.

Mrs. ROVNER. I thank you very, very much. This is the second greatest thrill of my life. I think the first one was June 6, 1955, the day I was sworn in as an American citizen and, in fact, the first time I ever saw a Federal judge in my life.

The CHAIRMAN. I believe your husband is a distinguished doctor.

Mrs. ROVNER. That is what he tells me, Mr. Chairman. Fortunately, I have never needed his services.

The CHAIRMAN. We are glad to have you and your son here to share this hearing with us this afternoon, and we are happy to have you and your parents, your father and mother and friends. That is all.

Thank you very much.

[Whereupon, at 5:15 p.m., the committee adjourned, subject to the call of the Chair.]

BIOGRAPHIES

CHARLES A. LEGGE

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF CALIFORNIA

Birth: August 24, 1930, San Francisco, CA.

Legal residence: California.

Marital status: Married to Janice M. Sleeper Legge, 3 children.

Education: 1948-1951—Stanford University, A.B. degree; 1951-1954—Stanford Law School, LL.B. degree.

Bar: 1955—California.

Military service: 1954-1956—U.S. Army.

Experience: 1956 to present—Bronson, Bronson & McKinnon.

MARCEL LIVAUDAIS, JR.

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF LOUISIANA

Birth: March 3, 1925, New Orleans, LA.

Legal residence: Louisiana.

Marital status: Married to Carol Black Livaudais, 3 children.

Education: 1942-1945—Tulane University B.A. degree; 1946-1949—Tulane University J.D. degree.

Bar: 1949—Louisiana.

Military service: 1945-1946, 1950-1952 U.S. Navy.

Experience: 1977 to present—U.S. magistrate, New Orleans; 1971-1977—Loeb & Livaudais, New Orleans, partner; 1967-1971—Loeb, Dillon & Livaudais, New Orleans, partner; 1960-1967—Loeb & Livaudais, New Orleans, partner; 1956-1960—Boswell, Loeb & Livaudais, New Orleans, partner; 1949-1956—Boswell & Loeb, New Orleans, LA, associate.

ILANA DIAMOND ROVNER

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: August 21, 1938, Riga, Latvia.

Naturalized: June 6, 1955, Philadelphia, PA.

Legal residence: Illinois.

Martial status: Married to Richard N. Rovner, M.D., 1 child

Education: 1956-1960—Bryn Mawr College, A.B. degree; 1958 (summer)—Villanova University; 1960 (summer)—Oxford University, Oxford, England; 1960-1961—Kings College, University of London, London, England; 1961-1964—Georgetown University Law Center; 1964-1966—Chicago-Kent College of Law J.D. degree.

Bar: 1972—Illinois.

Experience: 1971—Legal research, Richard J. Phelan, Esq.; 1972-1973—Law clerk, Hon. James B. Parsons, U.S. District Court, Northern District of Illinois; 1973-1977—Assistant U.S. Attorney, Northern District of Illinois; 1977 to present—Deputy governor for Chicago and legal counsel to Governor of Illinois.

CONFIRMATION HEARING ON: ANTHONY J. SCIRICA AND HAROLD J. LEZAR, JR.

THURSDAY, JULY 26, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 5:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Specter.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today we have met for the purpose of hearing two nominations; one, Anthony J. Scirica of Pennsylvania to be U.S. district judge for the Eastern District of Pennsylvania.

The other, Mr. Harold J. Lezar, Jr., of Texas to be assistant attorney general for the office of legal policy.

Now, I see Senator Specter here. So, Senator, come around. We will take you first. After you make your statement, then I will just swear them both at the same time. We are very pleased to have you, Senator. You are a prominent member of this committee, you can come up here if you prefer

Senator SPECTER. I am on my way up, as soon as I finish being a witness, if I may.

The CHAIRMAN. All right, you may proceed.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. It is a great pleasure to appear before you, Mr. Chairman, and to take just a moment to commend you on the outstanding work which you are doing as chairman of the Judiciary Committee, and express my pleasure of having an opportunity to work with you on the Committee on the Judiciary.

I am here today to introduce to the committee a longstanding personal friend, a jurist on the court of common pleas of Pennsylvania, of Montgomery County, and a truly outstanding lawyer.

The Honorable Anthony J. Scirica has served on the common pleas court in Montgomery County since 1980, and has distinguished himself as an outstanding jurist. He has a remarkable grasp of the law. He is a patient factfinder, he has judicial temperament in every sense of the word that has earned the respect of all of the lawyers who practice before him.

Prior to becoming a judge, Tony Scirica was a member of the House of Representatives, the Commonwealth of Pennsylvania, and served with distinction as chairman of the Committee Involving Criminal Law, and has been active on juvenile matters. He had been a practicing attorney prior to becoming a judge. His experience goes back to 1966, so that he comes to this position, Mr. Chairman, with some 18 years of background in the legal profession. He has an outstanding academic background, having graduated from Wesleyan University, having received his law degree from the University of Michigan, and then was a Fulbright scholar.

He comes to the Federal bench, assuming confirmation, which I think should be assured given his background and his record of competency and integrity, at the age of 43, which is just the right age to produce many years of distinguished service on the Federal bench. During that period of time, given his background, given the experience he has already had, I think he could make an enormous contribution to the U.S. District Court for the Eastern District of Pennsylvania, a hardworking court, and a court very much in need of additional manpower.

Mr. Chairman, it is my pleasure to introduce another distinguished Pennsylvanian, well known to you, and well known to the world, the Honorable John Heinz.

The CHAIRMAN. We are very pleased to have your fine endorsement, Senator Specter.

I see the senior Senator from Pennsylvania now. They say he is the handsomest man in the Senate, as well as one of the smartest. We are very glad to hear from him.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, I am honored and flattered to be here, and I thank you for holding this hearing so expeditiously. Let me thank my colleague, Arlen Specter, for preceding me. I was delayed, and I am glad that he was here to make sure that this hearing started on time.

I am, of course, above all, pleased to be here with the gentleman we present to you, Tony Scirica, the President's nominee for the U.S. District Court for the Eastern District of Pennsylvania.

Mr. Chairman, perhaps you are aware that the U.S. District Court for the Eastern District of Pennsylvania possesses a very long and proud history of judicial service to the region and to the Nation. The court was created in 1789, in the first piece of legislation ever enacted by the U.S. Congress. The court's first judge was appointed by George Washington, the first President of the United States, and throughout the years the U.S. District Court for the Eastern District of Pennsylvania has always upheld the highest tradition of judicial excellence.

Tony Scirica will continue those traditions, and I am delighted and pleased to be able to lend to his nomination my unqualified support.

In my estimation, Tony Scirica will bring to the Federal bench three great distinctions. First, Tony Scirica is a recognized scholar. The nominee who appears before you today is a 1962 cum laude graduate of Wesleyan University, and a 1965 graduate of the University of Michigan Law School. Between 1965 and 1966 he studied civil and international law at Central University in Venezuela, as a recipient of the Fulbright scholarship, as Senator Specter mentioned.

Since 1966, Tony has continued his education by attending the International Judicial College. Clearly, Tony Scirica has attained the academic and scholastic record desirable in members of the Federal Bench. Few individuals can match the record that he has complied with such distinction and grace.

Second, Tony Scirica is a respected member of the legal community. Senator Specter has touched on that, but I think it is worth noting that Tony has served our Commonwealth of Pennsylvania with exceptional distinction as a lawyer, as a legislator, and as a judge.

Between 1970 and 1979, he labored as a partner in the Norristown law firm of McGrory, Scirica, Wentz & Fernadez; and during that same period of time he also served as a member of the Pennsylvania State House of Representatives. As a member of that body, he called upon his legal training to draft several pieces of landmark legislation, including the Pennsylvania divorce code, the grand jury act, the electronic surveillance control act, the witness immunity act and the Pennsylvania crime commission act.

In 1980, he left the general assembly when the voters elected him to a 10-year term on the bench of the Montgomery County Court of Common Pleas. Since 1980, he has served that court with great ability. Tony's outstanding legal, legislative, and judicial record is one of great breadth and depth; I hope you will agree, and think as I do, that we are fortunate to have an individual of those combinations of qualities before us today.

But, third—and this is not unimportant in my judgment, Mr. Chairman—Tony Scirica is a respected member of his community, an honored civic leader. He is, of course, a member of the Montgomery County and Pennsylvania Bar Associations, a member of the Pennsylvania Conference on Trial Judges; he is chairman of the Pennsylvania Commission on Sentencing, a member of the supreme court's criminal procedures rules committee; and a lecturer at the Pennsylvania College on the Judiciary. He has also served as the vice chairman of the commission to study Pennsylvania's unified judicial system.

He was appointed to chair a panel investigating the hostage taking incident at the Graders Ford Correctional Institution; in 1980 he was named trustee of Temple University, and in 1981 he received the Law Day Award for dedicated leadership to the law from the Montgomery County Bar Association. In 1982 he received that same association's public service award, in recognition of his outstanding efforts in the public interests.

Mr. Chairman, I could continue to recite Tony's many accomplishments and distinctions, but frankly I am inclined to stop so that his confirmation process will be that much shorter.

Mr. Chairman, I clearly have no reservations about Tony's nomination. Indeed, I have nothing but happiness and joy for Tony Scirica on this day. He has extraordinary knowledge of the legal and judicial system, he possesses a great record of public service. I can attest to his ability to perform the role of Federal judge. As a common pleas judge, his record has been unsurpassed. I urge the committee to act as expeditiously as possible so that we can soon see Tony raise his right hand and be sworn in as a Federal judge.

The CHAIRMAN. Thank you very much, Senator.

You and Senator Specter both speak in glowing terms of the nominee. I was beginning to wonder whether or not this is too low a position for this nominee, after hearing you speak.

Senator HEINZ. I understand that there are a couple of vacancies coming up for a circuit——

The CHAIRMAN. I know you are both busy.

We thank you both, Senators, for your presence. You are welcome to stay longer, if you care to.

Senator Specter, you are a member of the committee, if you do stay, you can come up and join us here, we will be glad to have you, too, if you care to stay longer.

Senator HEINZ. Mr. Chairman, thank you. I appreciate it, but I will decline, as lacking membership on your committee, that kind of invitation.

The CHAIRMAN. Well, we are very pleased to have you.

Now, I might say, incidentally, that the next nominee, Mr. Harold J. Lezar, Jr.—Senator Heinz—Senator Heinz, I might say the next nominee has a Pennsylvanian connection, too, I believe his mother is from Pennsylvania. He went to school at Mercersburg Academy in Mercersburg, PA. I did not know whether you gentlemen knew him or not.

Senator SPECTER. Mr. Chairman, he has one additional Pennsylvanian connection, his wife. He is married to a very distinguished Pennsylvanian, Merrie Spaeth.

The CHAIRMAN. Although he is not from your State now, he has that Pennsylvanian connection. So I just wanted you to know that.

Senator SPECTER. We claim him, Mr. Chairman.

The CHAIRMAN. Thank your very much.

Now, Mr. Lezar, if you will come around, and we will swear you both in at once.

Do you swear that the testimony that you are going to give today will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SCIRICA. I do.

Mr. LEZAR. I do.

The CHAIRMAN. Mr. Scirica, Judge, you are, I believe a judge of the court of common pleas now?

TESTIMONY OF HON. ANTHONY J. SCIRICA, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF PENNSYLVANIA

Judge SCIRICA. Yes, sir, I am,

The CHAIRMAN. Without objection, I will place in the record a brief résumé about you, and I have a few questions here I would like to propound.

Do you have any members of your family or friends here that you would like to introduce to the committee?

Judge SCIRICA. Mr. Chairman, my family is not here today. They are in Europe, and I came back for this hearing, but I do have some friends of mine here; Mr. David Fisk, my former roommate, who used to work for Senator Schweiker, and some of my former law clerks; Mrs. Walicki, who works for the Department of Justice; Mr. Hoffman and Mr. Gitlin, they work here in Washington; and I am delighted that they are here today.

The CHAIRMAN. We are very pleased to have them with us.

Judge Scirica—incidentally, are you related to the Judge Sirica here in Washington, who was one of the Watergate judges?

Judge SCIRICA. Mr. Chairman, I am no relation, and I have never met Judge John Sirica.

The CHAIRMAN. Do you spell it the same way—you spell it a little different.

Judge SCIRICA. It is very close.

The CHAIRMAN. I believe that is S-i-r-i-c-a, and yours is S-c-i-r-i-c-a.

Judge SCIRICA. That is correct.

The CHAIRMAN. Judge Scirica, since 1981, I believe you have given lectures on criminal sentencing to trial judges in the State of Pennsylvania, and that you are currently the chairman of the Pennsylvania Commission on Sentencing, which promulgates sentencing guidelines.

I just want to inquire as to how successful has the commission been in establishing uniformity in sentencing, and would it be helpful to you as a district court judge to have a Sentencing Commission to establish such guidelines?

We have passed a bill through the Senate, it is going to the House, they have not acted on it yet.

Judge SCIRICA. We find the guidelines very helpful, Mr. Chairman, in Pennsylvania, and I think that the Federal judges might find them very helpful, as well.

I would add one word of caution, and that is to keep the guidelines simple, and to keep them advisory. In Pennsylvania, we found that each individual judge ought to have the discretion to impose the sentence that he or she thought was the appropriate one, and for that reason we made the guidelines advisory.

The goal was not so much to eliminate all disparity, but to eliminate unwarrented disparity, so that there were not the great range of sentences that existed prior to the guidelines. We think that we have done that. The guidelines have been followed in approximately 90 percent of all of the cases, and they simply provide the same starting off point for every judge in making that sentence, but the judge does not have to follow the guidelines if he or she feels that it is not the appropriate sentence.

The CHAIRMAN. I believe that also is the way our bill reads, that if it is not followed, they would have to explain why.

Judge SCIRICA. And we have the same provisions.

The CHAIRMAN. Judge Scirica, in reviewing your diverse background, I notice that you have been a practicing attorney and a member of the Pennsylvania House of Representatives General Assembly, I guess you call it up there, the same as we do in South Carolina—as well as a judge for the court of common pleas.

You have had the opportunity to both make laws as well as to utilize and interpret them. With this background, do you believe that changes in the law should be reserved to the legislature, whose members can be altered by the voters if the elected official fails to reflect the values of society?

Judge SCIRICA. Mr. Chairman, I strongly feel that matters of public policy ought not be decided by the Congress and by the legislature. The principal role of the courts is to adjudicated and settle disputes.

The CHAIRMAN. If it is a policy change, the Congress can make it, and if there is a change in the law, the Congress can make it with some Federal judges taking it unto themselves to run school districts, hospitals, and other institutions of local communities in the States. There has been a lot of complaint about that activitism.

Judge, it has been suggested that our prisons turn prisoners into more professional criminals.

What, in your opinion, can or should be done to improve our prisoner rehabilitation?

Justice Burger, you may remember, sometime back recommended that we have a factory, or an industry right beside a prison, where the people can work. They can earn some money instead of sitting in a prison, a lot of them, and have enough to do, and also it keeps them busy, and trains them for some skill after they get out.

Do you have any particular thoughts on how we can improve the prisoner rehabilitation?

Judge SCIRICA. Well, Mr. Chairman, I visited all of the State prisons in Pennsylvania, and I am convinced that perhaps the only effective rehabilitative program is one of jobs, and workings at learning a skill, and working at a job in the prison.

The other problem is basic education. Many of the people that are in prison cannot either read or write, and we are going a long ways to providing that basic education, but we are still not providing the jobs that you mentioned here. It has been tried in some States, we have had difficulty adopting it in our State system. But the criminologists that I have talked to, the people that work in the prisons, and everyone that has been connected with this problem state exactly as you have here this afternoon, that the only thing that makes sense is to approximate a job situation, and have those individuals work, earn some money, pay the room and board, pay for the dependents, and so forth.

The CHAIRMAN. I am hopeful that the unions will withdraw their objection to prison-made goods being sold in interstate commerce. It has been one handicap to this problem.

Judge SCIRICA. And it has been in Pennsylvania, sir.

The CHAIRMAN. Judge Scirica, it seems that many drug dealers, when arrested, are able to pay bond money easily, and in some cases leave the country to resume their activities elsewhere.

What changes, if any, in the bail reform do you think should be implemented in order to deter this type of activity?

Judge SCIRICA. I think it is the responsibility of the judge to make certain that a person accused of a crime is going to appear for trial, and within the constitutional limitation of reasonable bail, I think that in certain cases, a bail of an extremely high amount is necessary to ensure that these people will appear.

If we are talking about drug dealers, who deal in billions of dollars, then perhaps we are talking about bail that is considerably in excess of the kind of bail that is being used today.

And I and my colleagues in Montgomery County, when we have had these kinds of cases, have not hesitated to impose high bail restrictions in order to ensure the presence of these individuals.

The **Chairman**. Judge, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Judge **Scirica**. Well, Mr. Chairman, I think it is the responsibility of a judge to interpret the law as the Congress and the Legislature intended, and to do that we rely on our legal training and our experience, but where the legislative intent is clear, we ought to do everything we can to further that legislative intent, whether it be by the Congress or by the State legislature.

The **Chairman**. I presume you would feel that it would be necessary to follow the statute of the Constitution, even though you may have a personal feeling some other way, or may not agree with the statute?

Judge **Scirica**. I do feel that way, Mr. Chairman. As has been indicated, I spent 9 years in the Pennsylvania House of Representatives. I have an idea, a good idea of how legislation is made, and I think that that is the appropriate and constitutional forum for deciding those questions of public policy.

The **Chairman**. That is a live forum over on the floor. We are going to have to go over there and answer it. So we will take a recess now.

Incidentally, that completes the questions I had.

Do you have some questions now?

Senator **Specter**. Mr. Chairman, I do not have any questions. I am just delighted to have been here. I think I have said all I could say. I shall not ask any questions.

The **Chairman**. Senator Specter is a very prominent member of this committee, and you are fortunate to have both Senators recommend you, and especially to have a member of this committee to have a part in your confirmation.

Senator **Specter**. I will help the chairman get a quorum to confirm you.

The **Chairman**. We will now excuse you, and you need not wait until we come back, then.

Judge **Scirica**. Thank you very much, Mr. Chairman.

The **Chairman**. Mr. Lezar, we will get back to you as soon as we can. We will have a recess for about 10 minutes.

[Short recess.]

The **Chairman**. The committee will come to order.

Now, we have another nomination here. Mr. Harold J. Lezar, Jr. of Texas, to be an Assistant Attorney General for the Office of Legal Policy.

Mr. Lezar, we have already sworn you.

Would you care to introduce any of your family who may be here?

TESTIMONY OF HAROLD J. LEZAR, JR., NOMINEE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. LEZAR. Mr. Chairman, I would, very much.

My wife, Merrie Spaeth, who is so well thought of by the two Senators from Pennsylvania, and a lot of other Republicans, I am pleased to say, and my father and mother, Captain and Mrs. Lezar. In fact, this is my father's 70th birthday today.

The CHAIRMAN. Well, congratulations to you, sir. But remember, you are still just a young man yet.

Let us see, you have a résumé here. We will put it in the record.

Senator Tower could not be here, but he has a statement here endorsing you, Mr. Lezar, and without objection, it will go in the record at this point.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR JOHN TOWER

Mr. Chairman, I am pleased to have the opportunity to lend my support to the President's nominee for Assistant Attorney General for Legal Policy, a native Texan, Mr. Harold Lezar, Jr. Those of us who have known Mr. Lezar for a number of years refer to him as "Tex."

As the Committee is well aware, Tex has a very impressive background and résumé, and has been at the Department of Justice in the Attorney General's office since 1981 when he served as Special Counsel to the Attorney General. Last year, the Attorney General named Tex as Counselor to the Attorney General. Thus, Mr. Lezar has a very good working knowledge of the Department and its functions. Further, he has a good working relationship with the Attorney General.

Additionally, Tex has practiced law in the private sector. Upon graduation from the law school at the University of Texas at Austin in 1976, he joined a Houston, Texas, law firm as a trial attorney and specialized in the antitrust, commercial and energy law areas. In 1979, Tex was named General Counsel to the Texas Secretary of State. In late 1980, Tex returned to private practice before joining the Justice Department.

Upon graduation from Yale and prior to attending law school, Tex served as Staff Assistant to the President from 1971 to 1974. Mr. Chairman, in my view, Tex will serve the Department of Justice and these United States with distinction as Assistant Attorney General. Further, it is my belief that we will all be benefitted by his leadership in the Office of Legal Policy at the Department.

For these reasons, I would reiterate my support of the President's nomination of Mr. Lezar, and ask that the Committee act favorably upon his nomination.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Lezar, the Office of Legal Policy is responsible for the formulation and implementation of the major policy initiatives of the Department of Justice and the administration.

You are required to review and develop legislation and other policy proposals of major concern to the Department in the areas of civil and criminal law, as well as coordinate efforts to secure their legislative enactment or administrative implementation.

Your predecessor, Mr. Jonathan Rose, who I might add, did a fine job, told the committee at his confirmation hearings that the Office of Legal Policy was going to focus on problems such as the Freedom of Information Act and the Criminal Code.

What will be the focal points within the prescribed parameter of the Office under your leadership?

Mr. LEZAR. I am sorry to say that although the Senate passed landmark legislation overwhelmingly, supported by the administration on both of those subjects, there still remains a little bit of work to do on them in the House. So they are going to require additional work in the months ahead.

In addition, we are going to take a good hard look at what lessons we have learned over the last 3½ years in the administration, and see what new ideas we have for what we hope will be a second term. And of course, one of the other interests of the Department and this committee is that we have quite a few judges that we hope to be helping the President select, and sending up here, and working with this committee to get through.

The CHAIRMAN. We are very anxious to get the Criminal Code reform into law. We passed it once through the Senate, and the House did not act. It is going to be impossible, I think, to get it passed again this year. But next year we hope to get working on it again.

So, if you would begin thinking about that, and have your staff begin work on it, there are several objections raised by some of the Senators, some by Senator McClure, Senator Helms, I believe, and Senator Denton.

If you could arrange some time to have a conference with them, and see what they object to, and maybe see if we can reconcile those objections.

Mr. LEZAR. I am pleased to say that I am familiar with their objections, and we certainly shall.

The CHAIRMAN. Now, Mr. Lezar, your Office is also responsible for providing advice and assistance to the Attorney General and the Deputy Attorney General regarding the appointment of Federal judges.

As I have stated on many occasion, consider judicial nominations to be one of the major responsibilities undertaken by this committee and the Senate. Under the recently enacted bankruptcy amendment and Federal Judgeship Act of 1984, 11 circuit judges and 29 district court judges are to be appointed before January 21, 1985, or at least that many can be appointed.

Mr. Lezar, what will your Office do to expedite these appointments, while at the same time ensuring the nomination of only qualified and competent individuals?

Mr. LEZAR. Since we have been hoping that this legislation would pass for some time, we have been working already, and indeed, have been working with the White House and the President and this committee, and we will be ready to move very quickly on a lot—with a lot of nominations coming from the President. And we will do everything possible to move those expeditiously, because I cannot think of anything that is more important right now to the Attorney General and the President, than getting qualified, first-rate people on the bench.

The CHAIRMAN. Mr. Lezar, do you anticipate any procedural changes in your Office that will affect this committee with respect to judicial and nonjudicial nominations?

Mr. LEZAR. Other than the fact that I hope to work even more closely with this committee, I think the major change is going to be that we are going to work much more as an adjunct of the Attorney General on those issues of most personal concern to him. You know the Attorney General quite well, and know what a lot of those issues are, and I think that some of our work will be very valuable to this committee, I hope.

The CHAIRMAN. Mr. Lezar, your Office is responsible for administering the Federal justice research program, which provides contacts for research-related policy development. I understand there has been considerable improvement in this area with respect to tighter controls, and greatly enhanced selection criteria. What changes, if any, do you anticipate in this area?

Mr. LEZAR. Well, we are very pleased with the improvements that have been made, and I think we have several new ideas in mind, as well, to build upon that

One is, I think we want to scale it back a little bit and try to save the taxpayers a little bit of money in the future.

Second, I think we want to target the funds much more on shorter terms issues of great interest to the Attorney General, since the National Institute of Justice has other funds available for longer term, broader projects. In addition, I think we want to use the funds to try and bring in people with new ideas from around the country that might prove beneficial in the future, for our consideration and yours.

The CHAIRMAN. I want to congratulate you upon being appointed to this important and responsible position by President Reagan, and from your fine record in the past, I feel confident that you will live true to the trust imposed in you, and you run a great service to this country.

I do not believe I have any other questions at this time.

We are very glad to try to expedite your appointment here, as soon as we can. We are not meeting this week. We are meeting Tuesday of next week, and I hope we can bring it up on the agenda at that time.

We are very pleased to have your father and mother and your wife here, and friends, and we wish you well in your service in this important position of Assistant Attorney General in the Justice Department.

Mr. LEZAR. Thank you very much, sir.

The CHAIRMAN. We now stand adjourned.

[Whereupon, at 6:13 p.m., the committee adjourned.]

BIOGRAPHIES

ANTHONY J. SCIRICA

NOMINEE, U.S. DISTRICT JUDGE, FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Birth: December 16, 1940, Norristown, PA.

Legal residence: Pennsylvania.

Marital status: Married to Susan Morgan Scirica, 2 children.

Education: 1962—Wesleyan University, B.A. degree; 1965—University of Michigan Law School, J.D. degree; 1965-1966—Fulbright Scholar, Caracas, Venezuela.

Bar: 1966—Pennsylvania;

Experience: 1966-1970—Scirica & McGrory, associate; 1967-1969—Assistant district attorney, Montgomery County, PA; 1970-1979—McGrory, Scirica, Wentz & Fernandez, partner; 1971-1979—Member, House of Representatives, General Assembly; 1980 to present—Judge, Court of Common Pleas, Montgomery County, PA.

Harold J. Lezar, Jr.

NOMINEE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Birth: September 30, 1948, Dallas, TX.

Legal residence: Rosslyn, VA.

Marital status: Married to Merrie Spaeth.

Education: 1970—Yale College, B.A., with honors; 1976 University of Texas School of Law, J.D. degree.

Bar: Texas.

Experience: 1970-71—Assistant to William F. Buckley, Jr., editorials for National Review; 1971-74—Staff assistant and speechwriter for President Nixon; 1977-80—Mandell & Wright; 1978-80—Special counsel to Hon. John B. Connally, Jr. (part time); 1979-80—General counsel to Texas secretary of state, George W. Strake, Jr.; 1980-81—Private practice, Houston; 1981-83—Special counsel to Attorney General; 1983—Counselor to Attorney General of the United States.

CONFIRMATION HEARING ON JAMES HARVIE WILKINSON III

TUESDAY, AUGUST 7, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Biden, Mathias, Metzenbaum, Specter, Heflin, East, Denton, DeConcini, Hatch, and Kennedy.

Staff present: Robert J. Short, chief investigator; Allan Spence, investigator; and Carolyn Osolinik, counsel to Senator Kennedy.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

The Committee on the Judiciary meets today to hear testimony regarding the nomination of J. Harvie Wilkinson III, for the position of circuit court judge for the Fourth Circuit Court of Appeals.

Several committee members have expressed a desire to review certain allegations regarding this nomination, and although I feel these allegations have been adequately reviewed in hearings previously held by the committee and during floor debate before the full Senate, I have agreed to hold this third day of hearings. I hope that by doing so, we can resolve these matters once and for all and finally allow the Senate to work its will.

As I have previously stated, this committee has thoroughly evaluated Mr. Wilkinson's qualifications. The American Bar Association conducted a similar inquiry, and there is no evidence to indicate that their guidelines were in any way altered to accommodate the nominee.

Mr. Wilkinson has been found to be qualified for the position of circuit court judge by both the ABA and the Judiciary Committee. He is a man of knowledge, ability and integrity. I am confident that today's hearings will further enhance these findings.

Senator Kennedy is attending the funeral of Congressman Carl Perkins today and is therefore unable to be here. Senator Kennedy had requested that this hearing be postponed until a later date. I conferred with the majority leader and was advised that the cloture vote scheduled for Thursday at 3 p.m. could not be changed. I felt it necessary, therefore, to go ahead with today's hearing in order that the scheduled witnesses could be heard. I have agreed that Senator Kennedy's staff member may propound questions in his absence. This is a little unusual, but out of courtesy to him, I have agreed to do that.

Two well-known individuals, Mr. William Van Alstyne and Mr. Floyd Abrams, have requested to testify as to Mr. Wilkinson's scholarly reputation and experience. Senator Kennedy, however, has objected to these two individuals being added to the witness list, and therefore they will not be heard this morning.

I have received a letter from Justice Powell concerning his invitation to testify before the committee today, and without objection, I will read his letter.

> Dear Senator Thurmond: This is to thank you for the invitation to testify before the Judiciary Committee at a hearing next Tuesday on the nomination of J. Harvie Wilkinson III for a Federal judgeship. As I advised your Mr. Short, who called me late this afternoon, I have nothing to add to my letter to Senators Kennedy, Biden and Metzenbaum of March 12, 1984. Accordingly, I decline your invitation.
>
> Sincerely, *Lewis F. Powell, Jr.*

Without objection, the letters which were written to Senators Kennedy, Biden, and Metzenbaum, dated March 12, 1984, will follow in the record at this point. Also, I have a statement from Professor Van Alstyne which I wish to put in the record.

[The following was received for the record:]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR

March 12, 1984

Gentlemen:

This is in response to your letter of March 9, received by me at about 4:30 p.m.

The press reports I have seen are substantially accurate as to my conversations with three members of the ABA Judiciary Committee. It also is true that Mrs. Powell and I have known the Wilkinson family well for many years.

Mr. James Howard, a Committee member from my state of Virginia, called me last summer and asked my opinion as to the qualifications of J. Harvie Wilkinson, III, who clerked for me here. I responded favorably, noting the difference in the qualifications appropriate for a District Court judge and those for a Circuit Court Judge.

Mr. Lane, the Committee member for D.C., called me later (in November, I believe). As I recall, he stated he was calling me as a Virginian, and because of the negative report from Mr. Howard. I repeated the substance of what I had said to Mr. Howard. Also, responding to Mr. Lane's inquiry, I agreed that my name could be used. I wrote Mr. Howard informing him of Mr. Lane's call.

I was concerned by what Mr. Lane had said about the report from my state. This prompted me to call Gene W. Lafitte, of New Orleans, on my own initiative. Mr. Lafitte is a Committee member and friend with whom I have been associated in the American College of Trial Lawyers. In a brief conversation with him, I told him of Mr. Lane's call, and repeated my view as to the qualifications of Mr. Wilkinson. I did not inquire where he stood; nor do I know how he voted.

I have had no other occasion to speak to members of the Committee. It is, of course, not unusual for federal judges to be asked their opinion as to the qualifications of persons under consideration for appointment to the federal bench.

In view of your inquiry and your proper interest in Mr. Wilkinson's qualifications, I can say with confidence that of the some 45 fine clerks I have had in my 12 years on the Court, J. Harvie Wilkinson, III, ranks among the best.

He is an exceptionally gifted legal scholar, and a compassionate and thoughtful human being. In my opinion, he is fully qualified to serve on a Court of Appeals.

Sincerely,

Lewis F. Powell, Jr.

Senators Kennedy, Biden and Metzenbaum
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

lfp/ss

American Bar Association

March 12, 1984

CONFIDENTIAL

The Honorable Strom Thurmond, Chairman
United States Senate
Committee on The Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

I respond to the March 5 letter from Senators Kennedy, Biden and Metzenbaum with reference to the pending nomination of Mr. James Harvie Wilkinson, III. In doing so, it may be helpful to review the Committee's standard operating procedures.

The process begins when The Justice Department asks the Chairman that a candidate be investigated for a particular vacancy. Ordinarily the matter is referred to the Committee member for the circuit in which the vacancy exists, assuming that such member is readily available and not already overburdened. At the same time The Justice Department sends the Personal Data Questionnaire to the candidate with instructions to complete it and furnish a copy to the Chairman, the circuit member and the Justice Department.

The circuit member conducts an in-depth investigation. If in the course of that investigation concerns develop, he advises the Chairman and suggests that a second Committee member become involved to assist in the investigation. This is not an uncommon occurrence.

Such was the case in the Wilkinson matter and a second Committee member was designated to assist in the investigation. The two members worked together and interviewed the candidate. A single report on his qualifications was prepared. It was accompanied by separate statements of the two investigators in which each cited the conclusions he had reached. One member found the candidate qualified. The other found him not qualified. The report was circulated to all members together with the differing opinions of the two circuit members. A substantial majority of the Committee found Mr. Wilkinson qualified; a minority found him not qualified. When Mr. Wilkinson was nominated both the Senate Judiciary Committee and the candidate were advised of the ratings. The Committee does not reveal how its members voted but the term "substantial majority" has been adopted to indicate that the candidate has strong, but not unanimous, endorsement.

It must be understood that when a Formal Report has been prepared by one or more circuit members and circulated to the entire Committee, each circuit member considers the matter privately and makes his own decision as to the rating he believes appropriate. Such ratings are promptly conveyed to the Chairman and tabulated. Decisions are a matter of individual judgment and it is impossible to know the precise rationale which prompted each one.

Our guidelines provide "that ordinarily a prospective appointee to the federal bench should have been admitted to the bar for at least twelve years" (emphasis added). Our records indicate that Mr. Wilkinson was admitted to the Bar of the State of Virginia on February 1, 1972. When his name was sent to us for investigation at the end of July of 1983, he then had virtually, and certainly by now has, satisifed the 12 year requirement.

Your letter states that "We are particularly concerned about testimony that, on numerous occasions in recent years, the Committee has applied the guidelines inflexibly, and has advised The Administration that women and minority nominees who do not meet the twelve year/trial experience tests would not be found 'qualified' by the ABA. . . ." Several years ago the Committee, in recognition of the relatively recent influx of substantial numbers of women and minorities into the legal profession, amended its standards to provide:

> "In evaluating experience, the Committee recognizes that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited."

The suggestion that in recent years the Committee "has applied the guidlines inflexibly" to the detriment of women and minority nominees is not borne out by the facts. Of the eleven candidates with less than twelve years at the bar who were rated qualified or better by our Committee during the Carter Administration, time at the bar ranged from five years in one instance to eleven years in six instances. Two candidates had been admitted eight years, one nine years and another ten years. These included four women, one of whom was a member of a minority; five men who were members of minorities and two Caucasian men.

During the Reagan Administration there have been five candidates admitted to the bar less than twelve years who the Committee found qualified. Two of these were women, one was an Hispanic male and two were Caucasian males.

Our evaluation criteria further provide:

> "Substantial trial experience (as lawyer or a trial judge) is important for a prospective nominee to both the appellate courts and the trials courts. Additional experience which is similar to court trial work . . ., teaching trial advocacy or other clinical law school courses, etc. - is considered in evaluating a prospective nominee's trial experience qualifications. In exceptional cases, when there is significant evidence of distinguished accomplishment in the field of law, an individual with limited trial experience may be found qualified." (emphasis added).

Our records indicate that Mr. Wilkinson taught at the University of Virginia Law School from 1973 to 1978 and again in 1981/82 and that he regularly taught the following courses:

> Federal Courts - Subjects covered include case or controversy, federal question jurisdiction, implied remedies and rights of action, federal

common law, pendent jurisdiction, abstention, adequate and independent state grounds, section 1983, and federal habeas corpus.

Criminal Procedure - Topics covered are Fourth, Fifth and Sixth Amendment rights at different stages of the criminal process - - search, arrest, interrogation and line-up, bail and preliminary hearings, grand jury proceedings, and trial.

Constitutional Law - Subjects included the reach of congressional authority under Article I, Section 8, substantive and procedural due process, the equal protection clause, state action, and the speech and religion clauses of the First Amendment.

In addition thereto the experience of clerking for a Justice of the United States Supreme Court has to be given much weight, and in the opinion of prominent appellate justices, makes up for a lack of practice experience. A clerk to an appellate judge sees the best and the worst briefs and listens to some of the finest and some of the poorest arguments. In this process he should learn quickly to distinguish those things that are important and critical to the decisional process.

The guidelines further state

> "Without demeaning the scholarly qualities necessary for the trial courts, the Committee nonetheless looks for an especially high degree of scholarship and academic talent in prospective nominees for the appellate courts. The abilities to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts in future cases are matters of great concern for the evaluation of prospective nominees for the appellate courts.
>
> Recognizing that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theater of the courtroom) the Committee may place somewhat less emphasis on the importance of extensive trial experience as a qualification for the appellate courts." (emphasis added).

Mr. Wilkinson's extensive writings were furnished to the Committee and show him to be an unusually able writer and legal scholar with the apparent capacity to become an outstanding appellate judge. A number of law professors were among those whose views were solicited with respect to this nomination, and they were uniformly of the view that his legal scholarship was of a very high order.

It is apparent that all of the criteria set forth in the Standing Committee's brochure were taken into account by a substantial majority of the Committee in reaching the decision that Mr. Wilkinson was qualified. I want to assure you that I do not personally believe the Committee applied a double standard in rating Mr. Wilkinson nor that its action was unprecedented. In support thereof we have reviewed recent nominees to the various courts of appeal whom we have found qualified or better who had very limited trial experience. At least four of these had teaching backgrounds and had demonstrated intellectual accomplishment and writing ability. I believe that the action of a substantial majority of the Committee in finding Mr. Wilkinson qualified was entirely consistent with our action in the cases of the academics referred to above.

You have also expressed concern about reports of lobbying activities on behalf of Mr. Wilkinson. It is important to know that in this case there was only one vote taken. At about the time the Formal Report was circulated to the Committee, several Committee members called me in accordance with our practice to advise that they had received telephone calls on behalf of the candidate. I was personally concerned that it had apparently become known that the investigating Committee members were not in agreement and that a vote was being taken. I took up that concern with The Justice Department. I'm convinced that such calls made on behalf of the candidate did not influence any vote in his favor. It is not unusual for individuals with special information about a candidate under investigation to voluntarily supply this to the investigating Committee members. The members of the Committee are experienced in the handling of this kind of information and indeed welcome it. In this particular case, it was the timing of these calls which was objectionable.

It should be made clear that the investigating Committee members sought the views of several members of The Supreme Court, including Justice Powell for whom Mr. Wilkinson had clerked. These gentlemen had a unique opportunity to judge his performance and his abilities. The Justices contacted were uniformly enthusiastic.

In closing, let me say on behalf of the Committee that for more than thirty years it has sought to bring the independent good judgment of knowledgeable lawyers to the judicial selection process. We never have candidates. Our sole responsibility is to evaluate those names sent to us. The integrity of the process depends upon the integrity of each Committee member, and I am proud to be associated with thirteen people of great character.

Respectfully,

FREDERICK G. BUESSER, JR.
Chairman

FGB/dlw

cc: The Honorable Edward M. Kennedy
The Honorable Joseph R. Biden, Jr.
The Honorable Howard M. Metzenbaum

Prepared Testimony of William Van Alstyne
Senate Judiciary Committee, August 7, 1984
Nomination of J. Harvie Wilkinson

Introduction.

I am William Van Alstyne, Perkins Professor of Law at Duke University. I appear on behalf of Mr. Wilkinson who has been nominated for appointment to the federal court of appeals for the fourth circuit. I understand Mr. Wilkinson's name has been returned to this Committee for further hearings, following a previous favorable vote by the Committee and proceedings in the Senate that forestalled a vote in that body. The information I have suggests the nomination has been returned to provide a more complete record respecting Mr. Wilkinson's experience and qualifications.

I am not a personal friend of Mr. Wilkinson and he did not originally ask that I appear here. Rather, I was familiar with a good deal of his professional work in public law and more particularly in constitutional law. I was quite familiar, too, with the work of the fourth judicial circuit before whom I have appeared in a number of cases as assigned counsel or as *amicus curiae*. I have also addressed annual conferences of the fourth circuit (most recently again at their invitation this summer) on appellate trends in constitutional law. I am also acquainted with a number of the judges on that court (including the Chief Judge, Harrison Winter, as well as the immediate past Chief Judge, Clement Haynsworth, and Judges Dickson Phillips, Sam Ervin III, John Butzner, Donald Russell, and past Judges Sobeloff, Craven, and Bell). (I was once recommended for appointment to that court, by a panel appointed by President Carter). It was therefore a matter of positive interest to me that Mr. Wilkinson had been nominated this year.

After several months elapsed following his nomination, I learned of the exceptional delays in this Committee. I then telephoned Mr. Wilkinson (whom I have never met personally) to advise him of my own puzzlement over the delay. I told him also of my professional gratitude for his nomination -- that it would surely be welcome in the fourth circuit and contribute effectively to that important and seriously burdened court. In anticipation of my willingness to speak favorably of his nomination, he thanked me but modestly declined any help at the time.

Now, however, the matter is again before this Committee, and I am grateful for the opportunity to be here. I agree fully with those members of this Committee and of the Senate who take their obligation to review nominees to our courts of appeals seriously. My settled impressions of Mr. Wilkinson's work, however, suggest that the Senate has every reason for confidence in his qualifications and his temperament for judicial fairness. The nomination is one that should provide this Committee with satisfaction, rather than with further hesitation. I hope it will be approved.

II. Nominee's Qualifications.

As the Judiciary Committee knows, Mr. Wilkinson is a full professor of law at one of the nation's distinguished law schools, the University of Virginia. The dean of that school, Richard Merrill, has already written you of Mr. Wilkinson's standing as "among our best teachers," and as a "prolific scholar and writer on legal issues." I wholly concur in the latter observation. His production of three books and ten articles is impressive and the work I know best reflects a mature understanding and a quality of detachment for matters of federal law I believe you should be grateful to have. His principal book, From Brown to Bakke -- The Supreme Court and School Integration: 1954-1978 (Oxford Univ. Press, 1979), is overall exemplary scholarship which I reviewed long before knowing him at all and which I commended because of its completeness and its fairness (e.g., that "[c]ommendably, too, he is often at pains to give the strongest arguments on both sides of each major case and development . . . ."). See 57 Texas Law Review pp. 1489-93 (1979).

One of his principal articles, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Virginia Law Review 945 (1975), has become something of a staple within constitutional law literature; i.e., it is frequently referenced and relied upon as among the best reviews of constitutional doctrine in an overgrown and frequently confusing area of federal law. His co-authored article on Constitutional Protection for Personal Lifestyles, 62 Cornell Law Review 563 (1977), reflects a willingness to examine unsettled and frequently controversial subjects of federal adjudication, with clear-eyed professional handling and a commendable minimum of polemics.

He has complemented a distinguished career involving him in the same kind of research, analysis, and federal question assessment that characterizes a great deal of a federal appellate judge's work, with additional experience as well. The Committee may not be inclined to count one's service as a newspaper editor highly, if at all, but it ought not be dismissed. (One of our best regarded Justices, Justice Hugo Black, once surprised his interviewer [Eric Severeid] by noting that the Constitution does not require one to have been a lawyer even to qualify for appointment to the Supreme Court. When challenged to name even one non-attorney whose background and perspectives he thought might be welcome on the Supreme Court itself, Black replied without hesitation: "Walter Lippman." See Transcript, CBS News special, Justice Black and the Bill of Rights, Tuesday, Dec. 3, 1968.) Similarly, his recent service for a year, as Deputy Assistant Attorney General in the Civil Rights Division of our department of Justice (July 1982-August 1983), provides a fair exposure to administrative problems in our justice system that is not overabundant on our courts of appeal.

His prior service as a Clerk on the Supreme Court (to Justice Powell) assuredly provides a background enabling him to appreciate as well as anyone what the Supreme Court frankly expects of, and responds to, in its review relation of the court of appeals. That Justice Powell may have spoken favorably of Mr. Wilkinson, moreover, seems to me strongly in his favor (rather than to any possible suggestion of discredit as evidently has been suggested elsewhere). Having pressed upon Justice Powell candidates for clerkship consideration over the years, I am extremely aware of the rigor of Justice Powell's expectations.

Mr. Wilkinson's impressive experiences are plainly not unearned. His appointment as a Supreme Court Clerk, his unusually rapid advance to full professorship at one of our major law schools, - these successes merely track his work at Yale Unversity where he graduated Magna cum laude, with election to Phi Beta Kappa, and his subsequent distinctions in law school and as Notes Editor of the Law Review.

It has been suggested by others that it might be better to have a nominee with somewhat more substantial trial, practice or litigative experience than is reflected in Mr. Wilkinson's background. My own view is that such experience is much more significant at the federal district court level than the court of appeals level, although obviously it is well that appellate judges know something about the actual problems of the trial process. What is most valuable at the appellate level, however, is a capacity for understanding the written record, isolating the critical issues, and resolving them with keen understanding, detachment, and reasonable dispatch. The record Mr. Wilkinson has already produced, reflective of those skills, is far more substantial than this Committee ordinarily has had. It is in my view also overwhelmingly reassuring.

Were Mr. Wilkinson the sole judge of the fourth judicial circuit, misgivings for his litigative experience might provide some slight reason to pause. But as the Committee can readily determine, the great majority of the fourth circuit judges do provide a substantial background in practice and it therefore seems to me not to deserve equal empahsis here. From any serious perspective, no argument can be made that the fourth circuit lacks depth or background in that dimension. With the exception of Dickson Phillips (former Dean of the University of North Carolina Law School), however, it does not reflect as well as Mr. Wilkinson can add, the roundedness and depth that come from examining "the law" with the detachment and perspective that his distinguished academic career provides.

In coming to this nomination with a career that has never been less than distinguished at any level, that combines an insider's reasoning in the Supreme Court with administrative experience in the Justice Department, and that has been tested by a steady record of well-regarded teaching, study, and prolific publication on matters of federal law, it is clear to me that Mr. Wilkinson is highly qualified for nomination and appointment to the fourth judicial circuit. Indeed, in fairness, I believe a personal review by members of this Committee with other nominees recently approved without controversy, will satisfy you that this will be an exceptionally good appointment.

III. Some Concluding Thoughts.

Not having been previously involved in this nomination, it has been a minor puzzle to me to understand the exceptional delay this nomination has encountered. It remains a puzzle even after scanning the newspapers. That he may be a registered Republican (as I am not) may tempt some members of the Senate to delay matters in speculation on the outcome of the November election, but I hope it shall not do so. Although I would privately concur in that strategy if I regarded Mr. Wilkinson as less excellent than I think he is, unless there is valid reason of that sort to temporize, it is unworthy of this Committee and members of the Senate to behave in that way. President Carter, it will be remembered, appointed the largest single complement of federal judges in the history of the country. The task of the Senate was to assure itself that the system of justice would not suffer from his appointment prerogative, and not otherwise to deny it. The same standard, not a more grudging one, is presumably appropriate here as well.

It is also possible that some members of the Committee and of the Senate do not personally agree with all of Mr. Wilkinson's writings. Unless, however, it is to be the general standard that one must be unknown rather than known, an unpublished person rather than one who treats issues of significance openly, it cannot be the rule of this body that "publish" means "perish." Unless one finds something in the nominee's professional work that seems distrubingly mediocre, or so obviously biased or unprofessional that indeed it would be an abdication of your review responsibilities to concur in the nomination, one ought to be very careful. In Mr. Carswell's case, whose nomination was before this Committee a decade ago, it was my personal regret that his work did not reflect the level of excellence or of detachment this Committee should require for its approval -- and I was one of but a very few (originally) who appeared here, to say so. I do not believe this is anything comparable to that circumstance. To the contrary, I think it altogether the opposite. Mr. Wilkinson is exceptionally qualified to contribute to our federal judiciary, and I hope this Committee will swiftly conclude its work.

The CHAIRMAN. In this letter, the last paragraph contains this wording by Justice Powell:

> I can say with confidence that of the some 45 fine clerks I have had in my 12 years on the court, J. Harvie Wilkinson III ranks among the best. He is an exceptionally gifted legal scholar and a compassionate and thoughtful human being. In my opinion, he is fully qualified to serve on the court of appeals.

That statement is contained in the last paragraph of Justice Powell's letter.

Does the distinguished Senator from Ohio have an opening statement?

STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Yes, I do.

Let me preface my remarks by saying that I, for one, very much regret the fact that Justice Powell declined the invitation of the chairman to testify. I think that there are some questions that need answers that do not relate in any way to his responsibilities as a member of the Supreme Court, relating instead to the matter of a Supreme Court Justice involving himself personally in the confirmation of a member of the circuit court of appeals. Once he has opened the door by his participation, I think that we who have the responsibility to advise and consent ought to have the same opportunity, and full opportunity, to inquire of him in a more detailed manner, rather than just the letter itself. But certainly, I respect Justice Powell, and if he declines to appear, that is his decision, but I think it would make us more able to evaluate the degree of his involvement and the impact which it had on the ABA's decision in connection with this confirmation proceeding.

Mr. Chairman, I am pleased that you decided to hold this additional hearing on the nomination of J. Harvie Wilkinson III, to the court of appeals. Now, a number of members of your committee have been seeking this hearing for some time, in light of facts which were disclosed after the previous hearings into this nomination.

We particularly want to focus on the manner in which the American Bar Association found Mr. Wilkinson to be qualified for this important judicial post. Certainly, a number of serious questions have been raised about the integrity of the process. These questions are important when the Senate decides whether or not to confirm Mr. Wilkinson for two reasons. First, we seek to examine the nominee's role in allegedly improper lobbying of a nonpolitical ABA committee designed to impartially assess his qualifications. His conduct in this regard is highly probative of his temperament and general fitness to serve.

Second, I note that only a very small percentage of those confirmed by the Senate for judicial positions are rated unqualified by the ABA. Thus, to the extent that there is a significant possibility that the nominee would have been rated unqualified but for improper lobbying tactics, the Senate is entitled to know the facts.

Since the last hearings on this nomination, Senators have had an opportunity to focus on the nominee's record, particularly during his tenure as an editorial writer and a senior official in the Civil

Rights Division. I am pleased that this hearing will also afford us the opportunity to question Mr. Wilkinson in this regard.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The distinguished Senator from Maryland has requested additional hearings, and is here this morning. He is the ranking majority member next to me on the committee and I now call upon him.

STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. Thank you very much, Mr. Chairman.

I am glad that you have called these hearings. I think it is essentially a fair proceeding; I think it is fair to Professor Wilkinson and fair to those who have questions about his nomination. I think it is the right thing to have this additional session to examine the facts with respect to the nomination of J. Harvie Wilkinson to be U.S. circuit judge for the Fourth Circuit Court of Appeals.

It is interesting that the whole Senate has played a role here and has agreed that it would be prudent to complete the record on this important nomination before we vote on it. This is a course that several members of this committee have advocated, and I do not think we will regret that we have chosen this path.

The responsibility of the Senate to consent to nominations of Federal judges is, of course, a very serious one. The filling of vacancies on the circuit court of appeals is a particularly important part of this constitutional function. These courts, the circuit courts of appeal, have the last word on all but a virtual handful of legal controversies that are brought to the Federal courts. Ninety-nine percent of the decisions of the Fourth Circuit Court of Appeals are never reviewed by the Supreme Court of the United States. This statistic demonstrates that for the people of Maryland, for the people of Virginia and West Virginia and North and South Carolina, the fourth circuit is, in fact, the court of last resort.

No nominee should be confirmed to life tenure in such an important post if there are significant questions that remain unanswered about his suitability for the position of a U.S. circuit judge. I am hopeful that these hearings will dispel any questions that surround the nomination. I look forward to hearing the testimony of the nominee and of the other witnesses who will be here today, and I hope that these proceedings will adequately supplement the record so that the Senate may come to an appropriate resolution on the merits of the nomination.

I think our presence here today reflects very well upon the procedures that the Senate has adopted for the discharge of one of its most important responsibilities. If we had disposed of this nomination without an additional hearing, we would have given the people of Maryland and of the other States that are encompassed within the circuit the impression that we don't really care about the discharge of that responsibility. These people are counting on us to give this nominee's qualifications the thorough and objective scrutiny that is required and to act wisely on this nomination, but to act only when the facts are known. So it is my hope that after these proceedings are completed, the people of the fourth circuit will conclude that we have lived up to the trust that they have reposed in us and that we have acted wisely and well in passing upon this nomination.

Thank you, Mr. Chairman.

The **CHAIRMAN**. I want to say in holding this hearing that we are not establishing a precedent of having additional hearings after a nomination goes to the full Senate for consideration. When we held these several hearings, I want the record to show, that not a single Democratic Senator attended. They have the right to attend and could have attended. They could have propounded questions, and not a one attended.

Now, according to rank, I believe the next Senator is Senator Hatch.

Senator Hatch, do you have an opening statement?

Senator **HATCH**. I may, later, but let me pass for now.

The **CHAIRMAN**. The next ranking Senator is the Senator from Alabama, Senator Denton.

STATEMENT OF SENATOR JEREMIAH DENTON

Senator **DENTON**. Thank you, Mr. Chairman.

Much has been said about Mr. Wilkinson; however, I would like to again offer my strong support of the nomination of J. Harvie Wilkinson III, of Virginia to be a judge of the fourth circuit court of appeals.

Mr. Wilkinson appears uniquely qualified by his background and experience and will be an able addition to the Federal bench. He possesses a rare combination of extraordinary intellect and practical experience which will enable him to serve with great distinction.

Let us examine Mr. Wilkinson's background and experience. He is a 1967 Phi Beta Kappa, magna cum laude, graduate of Yale University. He was the notes editor of the Law Review at the prestigious University of Virginia Law School, from which he graduated with the Order of the Coif in 1972.

Mr. Wilkinson began his legal career as a law clerk for the Honorable Lewis F. Powell, Justice of the U.S. Supreme Court, for 1½ years. I note that Justice Powell has called Mr. Wilkinson one of the very finest of his 45 law clerks. Specifically, in a letter to the committee, Justice Powell stated that Mr. Wilkinson is an exceptionally gifted legal scholar, and a compassionate and thoughtful human being. The Justice went on to note that, * * * in my opinion, he is fully qualified to serve on the court of appeals."

Mr. Wilkinson then became a professor at the prestigious University of Virginia Law School, where he taught courses in Federal courts, criminal procedure, and constitutional law. At UVA, Mr. Wilkinson was one of the most popular professors on campus and earned the respect of liberals and conservatives alike for his scholarship. In fact, he won the award for the outstanding teacher in the entire university.

I would say to my colleagues that I feel a personal involvement with his nomination in that my eldest son studied under him while at the university. That son became the president of the student body of that law school. I say that to balance my next report on that son, which ~~is that~~ he, unfortunately, became a rather liberal Democrat in his political beliefs.

I do have reason to believe that Mr. Wilkinson tended to influence his orientation politically, so I find it the more anomalous that my friends on the other side feel called upon to oppose him.

Following that position, Mr. Wilkinson, after that position, ran the editorial page of the Norfolk Virginian-Pilot, one of the largest metropolitan daily newspapers in Virginia, where his editorials supported such progressive ideas as a holiday honoring the late Dr. Martin Luther King, Jr., and minority recruitment to the city police department's volunteer emergency response team.

He has served with distinction as Deputy Assistant Attorney General in the Civil Rights Division of the Justice Department. While at the Justice Department, he was responsible for the supervision of more than 50 litigators and for many complex cases.

Mr. Wilkinson is a scholar of national reputation, whose works have been used by courts and academicians alike. He has authored three books: "Harry Byrd and Changing Face of Virginia Politics"; "Serving Justice: A Supreme Court Clerk's View"; and "From Brown to Bakke: The Supreme Court and School Integration," a book well received by the civil rights community.

The CHAIRMAN. Senator, excuse me just a minute. I have got to go and open the Senate. I will ask Senator Hatch if he will come and preside until I return.

Senator HATCH. I would be happy to, Mr. Chairman.

[Whereupon, Senator Hatch assumed the Chair.]

Senator HATCH. Please continue, Senator.

Senator DENTON. Thank you, Mr. Chairman.

Mr. Wilkinson has also written a number of law review articles. It is my understanding that in the position for which he is nominated, research and writing in the law area are of paramount important, and I know of no one who has a more deserved reputation in those two fields than Mr. Wilkinson.

Therefore, on Thursday, I will vote in favor of cloture and in favor of the nomination, and I sincerely urge my colleagues to do the same.

Thank you, Mr. Chairman.

Senator HATCH. Senator DeConcini?

STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman, thank you very much.

I want to thank the chairman, Senator Thurmond, for his spirit of accommodation in scheduling this additional hearing. I also want to congratulate Senator Kennedy for his hard work and conscientiousness in closely examining the nomination of Mr. Wilkinson. I believe that Mr. Wilkinson is qualified to serve as a judge in the U.S. fourth circuit court of appeals. I believe he is an intelligent man and will do a competent job on the appellate court.

It has always been my position that the President is entitled to appoint the people he wishes to such offices as he has the authority and the privilege to fill. The Senate's role in the confirmation process is somewhat indefinite, but I believe that if an individual is competent and lawabiding, he or she ought to be confirmed. I have heard nothing during Mr. Wilkinson's extended confirmation process that has persuaded me that he does not meet the standards.

However, let me say there are two aspects of this nomination that disturb me. For these reasons, I am pleased that these hearings are being held today.

First, I am very concerned that this administration seems to believe that only white males are qualified to serve as Federal judges. I am aware that, for what I consider to be political reasons, the President has broadened his selections in the last month to include women and minorities. But I submit that the true test of his philosophy and commitment to justice in the first 3½ years of judicial appointments is not very good. As of May 1984, this administration had appointed approximately 140 Federal judges. Of these, only 14 have been women. The record of the administration as to minority appointees is even worse. As of May, less than 10 blacks and Hispanics had been appointed by President Reagan to the Federal bench.

Mr. Reagan repeatedly points to his appointment of Associate Justice Sandra Day O'Connor to prove his commitment to the advancement of women. The appointment of one woman to the Supreme Court does not make up for his dismal record on other Federal judicial appointments. The administration has expressed its desire to appoint qualified women and Hispanics to Federal judgeships, but has said that there are very few who meet the experience criteria. This explanation of past failures on their part is what concerns me about the Wilkinson nomination. While I think Mr. Wilkinson is qualified to be an appellate judge, I do not think he is more qualified than a number of women, Hispanics, blacks, or others. I have expressed my concerns about the lack of such appointments to Attorney General Smith, and I have received his assurance that every effort will be made to balance their appointment roster to include all Americans. If Mr. Reagan is reelected, I hope that this commitment by Attorney General Smith will extend to Mr. Reagan's second term. I intend to see to it that we do not have a replay of President Reagan's first 19 months in office in which he appointed 68 white men, 1 black man, and 3 women to Federal trial and circuit court judgeships.

I also have a great deal of concern about the role of the American Bar Association in the appointment and confirmation process. I believe we should limit our reliance on their recommendations and treat them as we do any other interested party.

I am pleased to see several members of the ABA's Standing Committee on Federal Judiciary. I look forward to hearing and reading their testimony. I have had experience with the ABA before on which they have been critical of very qualified individuals from my State. It is very difficult for me to be unbiased when they come to us with a recommendation for or against anyone.

So overall, Mr. Chairman, these hearings are constructive if nothing more, to ask some piercing questions of the ABA of just what kind of politics do they play with our judges.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator DeConcini.

Senator Specter?

STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Thank you, Mr. Chairman.

Before coming to what I conceive to be the subject of this hearing, just a comment about Senator DeConcini's remarks. My sense is that the President has done a good job in recognizing minority rights and rights of women in judicial appointments, and I say that after seeing the process in Pennsylvania, and the interest of the President, the White House and the Department of Justice in dealing with women, minority interests, blacks, and women. But the hearing today, as I see it, is on a very, very different issue. I think it important to focus on the fact that we are finally at this hearing as the result of a tortuous process on the Senate floor—a process involving a unanimous-consent arrangement, and the vitiating of an order for one a cloture vote after another cloture vote previously had failed—and we have come to this hearing as a result of those elongated proceedings.

The committee voted out the nomination of Professor Wilkinson back on March 15. At that time, I urged the committee not to vote on the nominee on that day because it had just come to light that there had been these activities, this lobbying, this, perhaps, pressure, on the American Bar Association, and at the time that the hearings were held on Professor Wilkinson, that was not known. It is a common practice when a judicial nominee is heard by the Judiciary Committee that no one is present except the chairman, with the exception of the Senators who may be presenting the nominee for their respective States. Indeed, with the press of business that the U.S. Senate has, it is entirely understandable that Senators simply do not have the time to appear at those proceedings or to make independent investigations of the judicial nominees. And I have been at many hearings when people from my State were at issue, and no one appears here, except the chairman, who does an excellent job in discharging his duty, interrogating each person who comes before this committee. But it is not uncommon for no one to be here except the chairman.

It is my conclusion, based on what I have seen both in the Senate and before, that the American Bar Association has a very important, profound, and almost exclusive impact on evaluating the qualifications of the men and women who come before this committee.

This committee had a celebrated case involving Sherman Unger, Esq., last year, where the American Bar Association took the position that Mr. Unger was unqualified, and did so in a context that the ABA really had the first word and the second word and the last word on the subject, and with some justification in terms of the precedent. I attended those hearings. There were five hearings. One of them began before 9 in the morning and ended at 6 in the evening. Senator Hatch, Senator Metzenbaum, and I were present, and we were the only three present, and that was a very sharply contested nomination. But the American Bar Association asserted its role there in very emphatic terms, and I believe that the American Bar Association has very substantial questions to answer in this proceeding as to what influence, if any, what undue pressure, if any, was brought to bear on the ABA in approving Professor Wilkinson.

We know the history. The Virginia representative of the ABA had found Professor Wilkinson unqualified. The District of Columbia representative found Professor Wilkinson to be qualified. Then there were substantial contacts between Mr. Schmults and Mr. Rose, and also Justice Powell, and the American Bar Association. And when those matters came to light, it seemed to me that it was imperative that the Senate know what had happened in order to make an evaluation on Professor Wilkinson's qualifications. I have never questioned Professor Wilkinson's qualifications. I have never disputed his qualifications. I have only wanted to know what they were, and have always felt this hearing to be necessary.

We had a hearing scheduled on May 17 through the Courts Subcommittee, with Senator Dole, on the ABA procedures, and that was canceled when it became apparent that the witnesses would include the subject matter of Professor Wilkinson's consideration itself.

Mr. Chairman, I ask unanimous consent at this juncture that the full text of my statement on the Senate floor on May 23, 1984, be included, and I will abbreviate what I will say at this point.

Senator Hatch. Without objection, so ordered.

[Material submitted for the record follows:]

process, he acquires the capacity for the kind of efficient, incisive, critical analysis that is so important to the appellate decisionmaking process. Indeed, in his tenure as a clerk, Professor Wilkinson learned these lessons so well that Justice Powell has commented that "of the some 45 fine clerks I have had in my 12 years on the Court, J. Harvie Wilkinson III, ranks among the best."

Upon the completion of his clerkship at the Supreme Court, Professor Wilkinson returned to the University of Virginia as a member of the law school's teaching faculty. He taught at the law school between 1973 and 1978, and again from 1983 through the present time. Professor Wilkinson has been a regular teacher of the Federal courts, criminal procedure, and constitutional law courses.

In addition to his teaching responsibilities Professor Wilkinson has devoted much of his time to developing an impressive array of scholarly legal writings in his several fields of interest. In this way, Professor Wilkinson has enriched his analytical skills as a legal writer. This talent and ability will be of special importance to him as he seeks to write legal opinions that lucidly explain the rationale for appellate decisions that are designed, in significant part, to serve as guidance for Federal district judges.

Between his two periods of service on the faculty at the University of Virginia Law School, Professor Wilkinson served as the editor of a significant metropolitan daily newspaper and as a high-ranking official at the U.S. Department of Justice. Both experiences form an important part of the reasons why Professor Wilkinson is so well qualified to be a Federal court of appeals judge.

As the editor of the Norfolk Virginian-Pilot, Professor Wilkinson honed further his strong writing skills. This position required him to shift his focus from writing for a scholarly audience in the legal world to writing for a lay audience. I have no doubt that this exercise was a beneficial one for Professor Wilkinson's future as a writer of judicial opinions. Perhaps equally important, as an editor and an editorial writer, Professor Wilkinson immersed himself in a wide variety of public issues that undoubtedly broadened his horizons in a manner that will make him a more well-rounded judge.

Serving as a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice supplemented Professor Wilkinson's already impressive experience as a Supreme Court law clerk, law professor, and newspaper editor. At the Justice Department, Professor Wilkinson gained the new perspective of the branch of the Federal Government that executes and enforces the laws. It is an expertise that has served well several current members of the U.S. Supreme Court. Chief Justice Warren E. Burger, as well as Associate Justices Byron R. White, Thurgood Marshall, and William H. Rehnquist, all served in high-level positions at the U.S. Department of Justice before taking their seats on the Supreme Court.

In summary, Mr. President, as the Senator from a State that lies within the Fourth Circuit of the U.S. Court of Appeals, I am proud to be counted among those supporting the President's nomination of Professor Wilkinson to be a member of that court. As a member of the Judiciary Committee who voted in favor of his nomination, I found that Professor Wilkinson has the education, the background, and experience, and the ability as a thinker and a writer, to be an exemplary Federal judge. In the words of Justice Powell, "he is an exceptionally gifted legal scholar, and a compassionate and thoughtful human being."

I commend President Reagan for nominating J. Harvie Wilkinson III to the Fourth Circuit Court of Appeals. And I strongly recommend him to my colleagues for confirmation by the Senate.

Thank you, Mr. President.

I thank you, Mr. President, for the opportunity to speak on behalf of this very fine and distinguished nominee.

I yield the floor.

Mr. THURMOND. Mr. President, if anybody else wishes to speak, they now have the opportunity.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GORTON). Without objection, it is so ordered.

Mr. SPECTER. Mr. President, I take the floor this afternoon to urge that the Senate not vote on the pending nomination of Professor Wilkinson until there have been further hearings before the Judiciary Committee to take up very important factors as they relate to Professor Wilkinson and the procedures and performance of the American Bar Association in their evaluation of Professor Wilkinson.

There are two interrelated issues as I see it. First is the issue of Professor Wilkinson's qualifications, and second is the independent issue of how the American Bar Association is performing the responsibility for reviewing judicial nominees. And that evaluation of the American Bar Association would be made in the context of the approval for Professor Wilkinson.

The position which I advocate is that there be a hearing on these important outstanding issues, and in pursuing this objective, I do not say that Professor Wilkinson is or is not qualified to be a judge for the Court of Appeals for the Fourth Circuit but only that there are vital questions to be answered as to his qualifications as it was found by the American Bar Association.

The questions which are raised relate to possible undue influence on the American Bar Association Committee. Those issues have already been addressed briefly by others who have spoken, and I will discuss them to some extent.

I take this position today, Mr. President, after having sought hearings in the Committee on the Judiciary before the vote on Professor Wilkinson was taken. The Committee on the Judiciary met in executive session on March 15, 1984, under an arrangement where there had been an agreement to vote on that day on Professor Wilkinson's nomination. I had not participated in any of the proceedings prior to that day and had been, in fact, prepared to vote on Professor Wilkinson when the matter came before the Judiciary Committee on prior occasions.

Shortly before the March 15 executive session of the Judiciary Committee, there appeared in the public domain the reports that there had been pressure on the American Bar Association by officials of the Department of Justice and a report that Supreme Court Justice Powell had called a member of the American Bar Association Evaluating Committee.

At the March 15 meeting of the Judiciary Committee, as the transcript shows, I said the following:

> Senator SPECTER. Mr. Chairman, up until this morning I had been prepared to vote on this nomination on the prior occasions when it was listed, but I am concerned about what has been disclosed more recently about the American Bar Association's standards. There were very extensive hearings on a matter involving Mr. Sherman Unger. Senator Hatch presided at those hearings on about five days. Some of them started at the beginning of the day and went past six o'clock. I was very much concerned about what the ABA was doing, as was disclosed in the Unger proceeding. That matter did not come to fruition, unfortunately, because Mr. Unger died after we had had five hearings before this Committee. But I, for one, place great reliance on what the American Bar Association says. It is not possible for this Committee, for members to attend the sessions and really give the kind of attention to these individuals who come before the Committee. I think that many of us place a lot of reliance of what the ABA does. I believe that we ought to——
>
> The CHAIRMAN. Senator, I have a letter from the ABA explaining all of it. I would like to take that up, if you would not object, at this time. I think that would satisfy your question.
>
> Senator SPECTER. Well, Mr. Chairman, if I may just finish very briefly. I would be delighted to look at the letter. I have not seen the letter. It had not been made available.
>
> My sense of this is that we ought to find out what the ABA is doing generally. This nomination is an important occasion to do it. So, I would join in the request that we do have a hearing, Mr. Chairman.
>
> The CHAIRMAN. Thank you.
>
> I might say that we do not have to act on what the American Bar recommends, but we do call upon them for recommendations. Now, as to how they go about it, they ex

plain the whole thing here. I think I can give a brief summary here that will explain their position here. This is in response to a letter that was written by the distinguished Senator from Massachusetts——

Senator Kennedy. I welcome the opportunity to discuss this. We do have the Prime Minister, who is addressing a joint session. Some of us are on the committee, the escort committee. We are requested to be there as of ten minutes ago. I think out of courtesy to the Prime Minister—I thought we would get to these discussions, but there were members who wanted to talk about the Meese nomination. I thought we would get to this discussion earlier today but——

The Chairman. Senator, this nomination has been here since November. You had ample time to get all the information you wanted. You agreed to vote today. We have the American Bar's statement as to how they go about this. We do not have to agree with them. We may disagree with the way they go about making their recommendations, but——

Senator Kennedy. Is the Chair's position that——

The Chairman. Let me get through now. The point is they have set that out in full. Here are five or six pages from the American Bar explaining their whole procedure and explaining what they did here in this case. We are not bound by it. We can vote for him or against him. But it is really unfair to keep this nomination.

If the Senator from Pennsylvania wants me to go into detail with the American Bar procedure, we can do it; but it really does not affect the nomination . . .

Senator Specter. Mr. Chairman, my preference would be to have the hearing on what the ABA does before we vote on this man.

The Chairman. What differences would that make?

Senator Specter. Short of that, I would request the Chair would schedule hearings on what the ABA does, even if we vote on Mr. Wilkinson today.

A few days later, on April 5, I wrote to the chairman requesting the hearings. Somewhat later, after discussing the matter again with the chairman of the Judiciary Committee and with Senator Dole, the chairman of the Subcommittee on Courts, and with Senator Baker, there had been a date set of May 17 to have a hearing on the ABA procedures. As I understood it, that hearing would have taken up what went on with Professor Wilkinson. When I sought to have certain witnesses appear at that hearing, Senator Thurmond responded that he had not anticipated that the hearing on the ABA procedures would take up the Wilkinson matter, and that he was not prepared to have a hearing on the ABA procedures intermixed with Professor Wilkinson.

I stated my position to Senator Thurmond, that I thought it indispensible that there be a hearing on the ABA procedures which did involve Professor Wilkinson, because otherwise it would be relatively meaningless to go into the ABA procedures in the abstract, without considering what was done in the case of Professor Wilkinson; and beyond that, if the Senate's constitutional duties regarding Professor Wilkinson were concluded, there would not be the same point or the same vitality in looking into what the American Bar Association had done.

Senator Thurmond responded that he was not prepared to have hearings before the Wilkinson matter was concluded on the floor of the Senate. I responded that it seemed to me that that was the appropriate course. That is why I am making this statement today, in an effort to see if some procedure can be worked out so that before we vote on Professor Wilkinson's nomination, we have a full scope Judiciary Committee hearing on the issues related to possible undue influence on the American Bar Association committee; because that directly bears upon whether the ABA approved Professor Wilkinson based upon the merits or whether the ABA committee approved Professor Wilkinson for some other reason.

In considering the nomination of Professor Wilkinson for a lifetime appointment to the Court of Appeals for the Fourth District, it is important to understand and articulate the distinction, at least as I see it, between the advise and consent responsibility of the U.S. Senate under the Constitution, where we deal with an executive appointment of an official who serves at the pleasure of the President, or whether we deal with a judicial appointment where the appointee serves for life, during good behavior, and where the appointee, for example, a man 39 years of age, as is Professor Wilkinson, would be likely to outlive many Presidents.

I, for one, believe that the Senate has a totally different advice and consent responsibility on judicial appointees. If we are talking about the confirmation of the nomination of a Cabinet officer, someone to serve on the team at the pleasure of the Chief Executive, to carry out his policies, to be terminated as the Chief Executive sees fit, that is one thing. But where we have someone as a member of the judiciary, in the independent branch of Government, given all the responsibilities for checks and balances, then it seems to this Senator that we have a different and a much higher line of responsibility in the discharge of our constitutional duty for advice and consent.

It is my view that there is enormous importance to the Federal judiciary and to the lifetime appointees who serve on the Federal judiciary.

I have a personal reverence for the constitutional Government of the United States of America and the rule of law which distinguishes our nation from most other nations of the world.

As a youngster in the late 1930's, I grew up in the era of Adolf Hitler, when tyranny and despotism and the abolition of the rights of the individual were the rule of the day, as Hitler spread his sway over Europe. Speaking personally, it was at that time that I decided to become a lawyer, because of my concern for the protection of individual rights as the most important of all pursuits. It is a view I have carried with me in the intervening years to this day, as a lawyer, practicing law since graduation from law school in 1956, as a district attorney, as a member of the Committee on the Judiciary, and really for precisely the kind of issue which is before the Senate today and of which I speak today.

Under our system of law, Mr. President, the U.S. Constitution vests a position of preeminence in the judiciary. While we talk about three branches of Government, separate but equal, there is one branch of Government under our system which has reached preeminence for a number of reasons—three factors, essentially.

The first is that there must be one branch of Government which makes the final judgment. Not surprisingly, that authority has fallen to the judicial system in the United States, because it was the judicial system which found the first occasion to make the decision as to which branch would have the ultimate authority.

In Marbury against Madison, in 1803, the Supreme Court of the United States decided that the Supreme Court of the United States would make the final judgments as to what the Constitution meant. One would not expect the Supreme Court to decide that the ultimate power resided elsewhere. It was a logical decision, but it was their decision; and for the intervening 181 years, the United States of America has prospered, to become the greatest nation this Earth has ever seen, with the preeminence of the Supreme Court of the United States.

A second factor which gives preeminence to the judiciary is the fact of life tenure of judges. That has resulted in an extraordinary group of talented men and women who make up the Federal judiciary and who pass upon some of the most difficult matters and render some of the most important judgments that anyone is called upon to make in our Nation or, for that matter, in the world. They constitute a group of high intellect, of extensive educational background, of extensive experience, and of real commitment. There are few, if any, in the Federal judiciary who could not make much more money by practicing law or engaging in other pursuits outside of the Federal bench. They have chosen the bench for a variety of reasons. Prominent among them is the prestige which attaches to being a Federal judge, the life tenure, the independence in their ability to decide matters in accordance with their conscience. But that life tenure distinguishes them immediately from members of the executive branch, where the President runs for office and his appointees serve at his pleasure; from members of the legislative branch, where we run for office and serve at the pleasure of the electorate.

A third factor which I think has led to the preeminence of the U.S. judicial system turns on the difference in the constituencies, contrasting the judiciary with the executive and legislative branches.

The executive and Congress are designed to be political institutions. Both the President and Members of the Senate and Members of the House of Representatives must accommodate to public opinion and to popular will.

Our constituency is the electorate. The courts' constituency is the Constitution, and that makes an enormous difference in the view of issues and problems as they come to the executive branch or to the legislative branch, contrasted with the view where those problems come to the judicial branch.

The President must constantly seek the consensus and find the way to appeal to a majority of the voters as our President does quite properly in the year 1984. And all those who run for the Senate or the House of Representatives similarly seek a consensus, seek an accommodation on ways to win a majority of votes to retain the positions in the political branch.

But judges in the federal system have the opportunity, really the luxury, not to be concerned about what is the popular will, what will be approved, what will be disapproved. They can look to the principles of the Constitution, the principles of the statutes, and they can decide cases in accordance with the loftier objectives and the loftier pronouncements of the law without seeking to accommodate to a consensus or the political factors.

We just celebrated this year, Mr. President, the 30th anniversary of Brown against Board of Education, where for the first time the law of the land held that discrimination was unconstitutional. It was in 1896 in the case of Plessey against Perguson that the Supreme Court of the United States handed down the doctrine of separate but equal. And as we review the passage of time from 1954 until 1984, one must wonder how we could ever say that the Constitution of the United States was being enforced and the equal protection clause of the 14th amendment was being observed, when blacks were compelled to ride in the back of the bus, blacks were compelled to go to separate schools, and blacks were discriminated against in so many ways.

But I daresay, Mr. President, that if it were up to the executive or legislative branches of the Government of the United States or the executive or legislative branches of State governments where action could have been taken, it is highly likely and probable that even in the year 1984 segregation would still be the rule of law in this country if it had not been for the detachment and objectivity, perhaps bravery—maybe it is not bravery when those nine U.S. Supreme Court Justices have life tenure and can take a look at the Constitution and interpret it as they see it without regard to whether they will hold their office because people will be unhappy with them. They, simply stated, cannot be voted out of office.

The Supreme Court of the United States has handed down many, many decisions which have been unpopular, and they have handed down those decisions because of their unique status. After the fact, many who denounced the decisions as being tyrannical or a usurpation of power or inappropriate, or who called for the impeachment of those who sat on the Court, after a period of time there has been an accommodation and even the bitterest critics of the Supreme Court of the United States have come to see that the Court's judgments had merit.

For most of my professional life I have worked in the criminal law field, as assistant district attorney, later as a district attorney, and had very close connections with the evolving field of decisions by the Supreme Court of the United States on criminal law.

In 1963, the Supreme Court of the United States decided the case called Gideon against Wainwright where for for first time the Court ruled that any defendant who was hailed into court had, as a matter of constitutional right, the right to counsel.

I started practicing law in 1956 and I became an assistant district attorney in 1959. I was a short-term voluntary defender in 1958 at the time when the city of Philadelphia had a defender's office supported by the United Way as a public charity with five lawyers who sought to represent the indigent defendants in that county. Those lawyers, in an office which now numbers in excess of 100, could not begin to represent all of the people who appeared in the criminal courts, and it was only in the most serious cases that an attorney was provided on a voluntary basis and those attorneys were not very experienced and were hardly adequate or competent counsel.

But Pennsylvania, which has prided itself, and still does, on being a forward-looking State which accords appropriate regard to individual rights, had not seen fit to provide counsel to indigents who were hailed into court and were then tried, subject to the deprivation of their liberty. Only in murder cases, capital cases, was counsel provided at the expenses to the State, and that was done only because in Betts against Brady the Supreme Court of the United States had some years earlier required that.

But in Gideon against Wainwright the Supreme Court of the United States ruled that thereafter no one could be hailed into court, using Justice Black's language, without having an attorney provided for him by the State wherever the case could deprive him of his liberty.

And then, by the mid-1960's or late 1960's, we marveled at how we had gotten along in the judicial system for so long without according defendants their right to have a lawyer represent them.

In 1967 the Supreme Court of the United States decided a case called Gault, where for the first time the Supreme Court said that as a matter of due process of law juveniles were entitled to the same procedural safeguards which adults had, the right to cross-examination of accusers, the right to confrontation, the full panoply of rights absent only the right to jury trial.

In 1966 the Supreme Court decided the case—and this is the last Supreme Court case that I am going to refer to in this sequence—of Miranda against Arizona, and I do so because it is illustrative of a case which I throught was conclusively wrong, which hamstrung law enforcement and prosecutors and which was an absolute anathema, and notwithstanding my personal disagreement with the case it seemed to me as a matter of principle that there ought not to be a constitutional amendment which would change that judicial decision.

In Miranda against Arizona, the Supreme Court of the United States ruled that before a statement or confession by a suspect could be introduced into evidence in a trial the defendant would have to be given specific warnings by the law enforcement officials and make specific waivers. The defendant would have to be advised that he had a right to remain silent, that anything he said could and would be used against him in a trial, that he had a right to counsel, that he had a right to counsel appointed by the State if he could not afford one and if he started to speak at any time he could change his mind and stop speaking. After these warnings were given the Supreme Court ruled that there had to be an express waiver of the defendant regarding his right to each one of those constitutional rights.

The Supreme Court then decided a week later that no statement or confession could be introduced into evidence in any trial started after June 13, 1966, the date of the Miranda decision unless the defendant had been accorded his constitutional rights on those warnings and waivers prior to the time the statement or confession was obtained.

Now it was hardly possible to have someone given those warnings and make those waivers in the time prior to the Miranda decision, because no one knew, prior to June 13, 1966, what the Supreme Court was going to decide.

One case is illustrative, on a man named Hickey, who was arrested in Philadelphia and charged with murder on an incident which occurred in May 1966 where Hickey confessed. The police did not give Hickey the Miranda warnings because the Miranda warnings were unknown as of that date, were not known until approximately 1 month later. But after Hickey confessed, the police went to his apartment, found the gun, found the fruits of the taxicab robbery, and developed a case which showed conclusively that the defendant Hickey was in fact guilty of robbery-murder, murder in the first degree.

A month later Miranda came down. The Supreme Court said that no confession could be introduced unless the rights had been given on any matter which had not gone to trial prior to June 13, 1966. Hickey moved to suppress the confession and the fruits of the confession. The motion was granted and Hickey walked out scot-free.

The Miranda case imposed, as I say, extraordinary burdens on law enforcement and the retroactivity aspect of Miranda, in my judgment, made absolutely no sense. The Philadelphia district attorney's office filed petitions for reconsideration and sought review in the Supreme Court of this decision, and all to no avail.

When the National District Attorney's Association took up the issue of a possible challenge, some members of the National District Attorney's Association took up the issue of trying to amend the Constitution. It was my view that we should not do so because, while we might disagree with a specific decision by the Supreme Court of the United States, in the long run the Court expressed the national moral conscience and ought to be observed; and we could get involved in the extended debate about whether the Court was legislating as opposed to interpreting, but somebody had to make that final decision on what was legislation and what was interpretation, and that ought to be the Court.

I speak at some length about Miranda and Hickey illustrative of the depth of the disagreement which I had with the Court on that position, but concluded that, in the history of the court, its procedures and its practices were so important on the final word that they ought to be respected whether or not any of us agreed with any of the individual cases which the Court decided.

It is against this background of my personal view that it seems to me that the utmost attention, analysis, and scrutiny ought to be paid to those who seek appointment and confirmation to the Federal courts of the United States. The Judiciary Committee has traditionally given great weight to the recommendations of the American Bar Association committee.

The ABA has established a committee with representatives serving in each of some 13 regions around the United States. Their recommendations are made to the Department of Justice. The Department of Justice conducts an investigation which includes an investigation by the Federal Bureau of Investigation going principally to the issue of character and, for all practical purposes, the American Bar Association review is the most emphatic item on the issue of qualifications of those who seek confirmation by the U.S. Senate.

The American Bar Association opposed the nomination of Sherman Unger, Esquire, a matter which came before the Judiciary Committee last fall. The ABA was very firm in its opposition to Mr. Unger and very stern in its pronouncement that the highest standards had to be observed. Notwithstanding the President's appointment of Mr. Unger, the ABA contested Mr. Unger's qualifications in very extensive proceedings before the Judiciary Committee.

I participated in those hearings, which were some five in number and lasting very protracted periods of time. One of them started about 9 a.m. and went until past 6 p.m. And it was more than a hearing on Mr. Unger, it was really a trial or a series of trials on quite a number of activities of Mr. Unger, on his professional life.

Unfortunately, Mr. Unger died before the hearing process was concluded, before the committee had made a recommendation or decision.

It was in sharp contrast to the kind of a practice which characterized the American Bar Association's activities as to Sherman Unger that the ABA has apparently performed when it has come to Professor Wilkinson.

There is a wide variety of material in the file on the subject of contacts with the members of the American Bar Association Committee. One of the contacts was made by a Justice of the Supreme Court of the United States, the Honorable Louis F. Powell, Jr. There was an inquiry made by Senators KENNEDY, BIDEN, and METZENBAUM of Justice Powell. Justice Powell responded by letter dated March 12, 1984, as follows:

> Gentlemen, this is in response to your letter of March 9; received by me at about 4:30 p.m.
>
> The press reports I have seen are substantially accurate as to my conversations with three members of the ABA Judiciary Committee. It also is true that Mrs. Powell and I have known the Wilkinson family well for many years.
>
> Mr. James Howard, a Committee member from my state of Virginia, called me last summer and asked my opinion as to the qualifications of J. Harvie Wilkinson, III, who clerked for me here. I responded favorably, noting the difference in the qualifications appropriate for a District Court judge and those for a Circuit Court Judge.
>
> Mr. Lane, the Committee member for D.C., called me later (in November, I believe). As I recall, he stated he was calling me as a Virginian, and because of the negative report from Mr. Howard. I repeated the substance of what I had said to Mr. Howard. Also, responding to Mr. Lane's inquiry, I agreed that my name could be used. I wrote Mr. Howard informing him of Mr. Lane's call.
>
> I was concerned by what Mr. Lane had said about the report from my state. This prompted me to call Gene W. Lafitte, of New Orleans, on my own initiative. Mr. Lafitte is a Committee member and friend with whom I have been associated in the American College of Trial Laywers. In a brief conversation with him, I told him of Mr. Lane's call, and repeated my view as to the qualifications of Mr. Wilkinson. I did not inquire where he stood; nor do I know how he voted.
>
> I have had no other occasion to speak to members of the Committee. It is, of course, not unusual for federal judges to be asked their opinion as to the qualifications of persons under consideration for appointment to the federal bench.
>
> In view of your inquiry and your proper interest in Mr. Wilkinson's qualifications, I can say with confidence that of the some 45 fine clerks I have had in my 12 years on the Court, J. Harvie Wilkinson, III, ranks among the best. He is an exceptionally gifted legal scholar, and a compassionate and thoughtful human being. In my opinion, he is fully qualified to serve on a Court of Appeals.
>
> Sincerely,

—what appears to be the signature of Lewis F. Powell, Jr., addressed to Senators BIDEN, KENNEDY, BIDEN and METZENBAUM, Committee on the Judiciary, U.S. Senate, Washington, D.C.

In my own personal opinion, Justice Powell has every right to express an opinion about Professor Wilkinson or anyone else. But in a context where, as outlined in Professor Wilkinson's letter, there had been a negative report from the first person who evaluated Mr. Wilkinson, where there was later an affirmative report, where there was an issue as to the procedures before the ABA, and where Justice Powell, as he puts it, on his own initiative called a member of that committee, then I believe that Justice Powell ought to respond like any other citizen to questions in a hearing conducted by the Committee on the Judiciary.

There is obviously some reason to believe that there has been a shift of position by the American Bar Association committee, as the committee has reviewed the qualifications of Mr. Wilkinson.

There were other allegations as to contacts made by representatives of the U.S. Department of Justice. Part of that is included in the letter from Mr. Frederick G. Buesser, Jr., chairman of the American Bar Association committee.

Mr. President, since the full context of the letter has been printed in the Record earlier today, I intend to read only a portion of it.

On page 5 of the letter to Senator THURMOND, copies to Senators KENNEDY, BIDEN, and METZENBAUM, Mr. Buesser writes as follows:

> You have also expressed concern about reports of lobbying activities on behalf of Mr. Wilkinson. It is important to know that in this case there was only vote taken. At about the time the Formal Report was circulated to the Committee, several Committee members called me in accordance with our practice to advise that they had received telephone calls on behalf of the candidate. I was personally concerned that it had apparently become known that the investigating Committee members were not in agreement and that a vote was being taken. I took up that concern with The Justice Department. I'm convinced that such calls made on behalf of the candidate did not in-

> fluence any vote in his favor. It is not unusual for individuals with special information about a candidate under investigation to voluntarily supply this to the investigating Committee members. The members of the Committee are experienced in the handling of this kind of information and indeed welcome it. In this particular case, it was the timing of these calls which was objectionable.

According to press reports, telephone calls were made to the members of the committee by Deputy Attorney General Edward Schmults and by Assistant Attorney General Jonathan Rose. It is my personal view that there ought to be a thorough inquiry into all contacts made between anyone and any member of the American Bar Association committee which was passing on Professor Wilkinson given the underlying facts of this case—that one representative of the committee found Professor Wilkinson unqualified, then a second member found him qualified, and that there was some disagreement among the committee as to his ultimate status on their report. At page two of Mr. Buesser's letter he points out: "The report was circulated to all members together with the differing opinions of the two circuit members. A substantial majority of the committee found Mr. Wilkinson qualified; a minority found him not qualified."

In the context of Mr. Buesser's statement that there was an objectionable feature to these calls—being the timing—I believe that the Judiciary Committee has an obligation to find out the underlying facts, and it may well be that there was something more objectionable than just timing.

There have been reports that Mr. Buesser summoned individuals who had been applying the information, if not pressure, and told them to cease and desist. But the procedures involved in this case by the American Bar Association, Mr. President, bear very directly upon whether the ABA followed the appropriate practices in its judgment on Professor Wilkinson.

There may be others who will speak about the qualifications of Professor Wilkinson. I am not prepared to do that at this time because I believe our record is incomplete as to Professor Wilkinson's qualifications.

Some may say that the Senate may make its judgments regardless of what the American Bar Association may do. That may be true, if in fact there were procedures established in the Senate to make the kind of in-depth, independent investigation which could lead the Senate to determine the question of qualification.

But I submit that is not in fact done; that there is great reliance placed upon what the American Bar Association committee does, and that both of the questions are of tremendous importance. Before we pass upon the qualifications of Professor Wilkinson, we need to know what anyone said to all of the members of the ABA committee which passed judgment—whatever their rank may be, whether they be Supreme Court Justice Powell, or the Deputy Attorney General of the United States, or the Assistant Attorney General of the United States, or whoever they may be—to decide whether the conclusion by the ABA committee was the result of undue influence or not. This matter is of great importance in evaluating what the ABA has been doing, what we may expect the ABA to do, so that the Judiciary Committee can decide, or at least I as a member of the committee can decide, what reliance if any to place upon the committee's recommendations in the future.

Mr. President, there is an article of some significance on this subject raising allegations, which is worth commenting on briefly, as it appeared in the Washingon Post on March 15, 1984.

It is reported in some greater detail on some of the surrounding circumstances to Mr. Buesser's letter. The Post article recites as follows:

> In a letter this week to the three Democrats, Buesser said he became "personally concerned that it had apparently become known that the investigating committee members were not in agreement and that a vote was being taken. I took up that concern with the Justice Department."
>
> Buesser said he also complained to Justice that several committee members had received telephone calls, timed to coincide with the secret ballot, urging approval of Wilkinson. "In this particular case, it was the timing of these calls which was objectionable," Buesser said.
>
> Former deputy attorney general Schmults said yesterday that he was the Justice official to whom Buesser complained. Schmults also acknowledged that he and Rose had made calls to several committee members, mentioning the fact that Howard and Lane were split on Wilkinson's qualifications for the bench.
>
> "I regretted that and I wrote that to Buesser," Schmults said: "How they (the two investigators) were leaning should be confidential."
>
> Schmults said he and Rose made the telephone calls because they had not been consulted by the ABA investigators on Wilkinson's qualifications. Wilkinson served from 1982 to 1983 as deputy assistant attorney general under the two men.
>
> "We were surprised," Schmults said. "We had worked with Jay a long time and had a good idea of his qualifications. . . . We did no more than give (the committee) additional information so they could make a better decision."

Mr. President, little is generally known about the scope and importance of a judge of the court of appeals. Those of us who had occasion to practice before the courts of appeals may have some knowledge, but even in the U.S. Senate where we deal with lawmaking and where many of us are members of the bar, relatively few of us have had recent occasions to appear in courts of appeals, and certainly with our workload, we have no occasion to be conversant with the scope, the depth, and the importance on a continuing basis of the decisions which courts of appeal judges make.

For purposes of illustrating the great importance of this position and the kind of care and attention which I submit we ought to be giving to it, I will refer to a number of such decisions which have been decided on a 2-to-1 basis. As the Presiding Officer knows, the practice of the courts of appeals is to sit in panels of three, and decisions are made on the basis of 2-to-1 votes in many, many cases, hearings before the courts of appeal en banc which may consist of nine or more members being a relatively infrequent occurrence.

One circuit court judge, therefore, has the power to make final decisions in cases of great importance and in cases where the circuit court, for all practical purposes, is the final reviewing court, where the circuit court is not reviewed by the Supreme Court of the United States which takes, by certiori or appeal, a very limited number of cases.

Mr. President, in a case of great significance decided earlier this year, January 18, 1984, by a 2-to-1 decision, the Court of Appeals for the Second Circuit decided a case involving very important first amendment rights. The case is captioned *Securities and Exchange Commission* v. *Lowe*, reported at 725 Fed. Reporter, 2d series, page 892.

In that case, the Securities and Exchange Commission sought an order enjoining the publisher of investment material and the corporations he controlled from continuing to publish such materials. The U.S. district court, Judge Weinstein presiding, had found that the Investment Advisers Act could not be construed to permit the SEC to revoke the investment adviser's registration and thus bar him from publishing his newsletters without violating the U.S. Constitution.

An appeal was taken. The court of appeals, by a split 2-to-1 decision, held that, first, the investment adviser's newsletters were subject to the registration requirement of the act, and the authority to revoke the investment adviser's registration, and, as a result, bar him from publishing his newsletters did not violate the first amendment.

In a case of great importance involving the Civil Rights Act, decided by the Court of Appeals for the Third Circuit, rehearing denied February 9, 1984, this year, in a case captioned *Lewis* v. *University of Pittsburgh*, reported at 725 Federal, 2nd, 910, a black female had brought an employment discrimination action against the university and the university bookstore on the ground that she was denied promotion because of race.

The district court rendered a judgment in favor of the defendants, and on appeal, by 2-to-1 split decision, the Court of Appeals in the Third Circuit ruled that the civil rights statutes all require the showing of "but for" causation in employment discrimination suits, and that it was not enough for plaintiff to show that race was a "substantial" or a "motivating" factor leading to the defendants' decision not to promote her, and that the jury was properly instructed on the correct test to be employed in determining employment discrimination, notwithstanding that instruction referred to race in terms of "the determinative factor."

Obviously, that case, distinguishing "but for causation" from "substantial" or "motivating factor," was decided, in effect, by a single court of appeals judge having the effect of ruling law over a great area with millions of people in this country.

An important decision was handed down interpreting the Fair Housing Act by the Court of Appeals for the Fourth Circuit on January 6 of this year, as reported in 724 Fed. Reporter, 2d series, page 419. In that case, a black insurance agent, Charles E. Mackey, sued Nationwide Insurance Co., challenging redlining practices as a violation of the civil rights laws, the Fair Housing Act, and also the antitrust laws.

The district court dismissed the complaint, and the court of appeals held that the antitrust claims were barred by the McCarran-Ferguson Act, that the agent lacked good standing to attack redlining practices under the Civil Rights Act, and the Fair Housing Act did not deal with the issue. There, again, a matter of great importance decided, in effect, by one circuit judge.

The anti-obscenity statute, first amendment rights, were involved in a case captioned J. R. Distributors, Inc. against Eikenberry, decided by the Court of Appeals for the Ninth Circuit, as reported in 725 Fed. 2d, 482, where challenges were brought to the anti-obscenity statute of the State of Washington and the district judge concluded that the statute was constitutional. The U.S. District Court for the District of Washington upheld the statute, and appeal was taken. The court of appeals, by a 2-to-1 decision, ruled that facial challenge was proper, that there was no basis for abstention by the Federal courts, that the definition of "prurient," which included "lust" was unconstitutional, and that the provision of the statute imposing a fine based upon all sales from places where moral nuisance occurred, including sales of protected material, was unconstitutional. That question again was decided by a single judge.

The U.S. Court of Appeals for the District of Columbia, in a case captioned "NAACP Legal Defense and Educational Fund, Inc., et al., v. Donald J. Devine, Director, U.S. Office of Personnel Management," decided a case with substantial first amendment issues. There, the Legal Defense Fund brought suit alleging that an executive order unconstitutionally excluded them from participating in a charitable fundraising drive involving Federal employees and military personnel. The district court held that the exclusion of legal defense funds from designated contribution portion of a fundraising drive was unconstitutional, and the appeal was taken.

The Court of Appeals for the District of Columbia Circuit, again by a split decision, 2 to 1, held that the Government's restrictions on which charities could participate in fundraising drives involved restrictions on first amendment activity and the Government's exclusion of the Legal Defense Fund from fundraising drives was not reasonable. Therefore, whether or not the drive was a public forum, the action therein violated the first amendment.

Mr. President, I see my distinguished colleague, the Senator from New Hampshire (Mr. RUDMAN) has arrived on the floor. While I have a long list of cases and substantially more to say, in deference to my—I was about to say learned colleague, but I shall not, since he is not a judge. That is an appellation given by judges to judges and for judges. A more appropriate designation in this body is distinguished, and he genuinely is. At this moment, I yield the floor.

I thank the Chair.

The PRESIDING OFFICER (Mr. COCHRAN). The Senator from New Hampshire.

Mr. RUDMAN. Mr. President, I thank the Chair, and I thank my friend from Pennsylvania.

I rise somewhat reluctantly to speak on this issue because, quite frankly, I do not enjoy opposing any nomination of an individual who, in my view, is of high personal character, great integrity, unquestioned scholarly ability. But I do rise today, and although I do subscribe generally to the comments that were made here by my friend from Pennsylvania, I rise today for reasons other than what we have heard so far.

It seems to me that what the American Bar Association wants to do or not do is important. It seems that what standards they apply to one class of Americans as opposed to another class of Americans might be important. And I think it is also of great interest to this body how pure or sterile, if you wish, the appointment, nominating, lobbying practices are in what is supposed to be some sort of very pure and impartial evaluation by the American Bar Association. That would be very interesting to look into, and I could talk about that. But, Mr. President, it seems to me that there is something in this particular nomination which is much more basic than that.

To anyone who has practiced law, who has appeared before appellate courts, trial courts, the U.S. Supreme Court, as I have had the privilege to appear, ought to have some personal standards to apply to one who is nominated to a position as lofty as that of a judge on the U.S. Circuit Court of Appeals for the Fourth Circuit. That circuit, encompassing Maryland, the Carolinas, West Virginia, and Virginia, is, as are all of our circuits, a very important circuit court of appeals.

As the distinguished Senator from Pennsylvania alluded to a few moments ago, in many instances, the decisions that are made on the closest margin of all, a 2-to-1 margin. What is generally not known to most people who do not practice law is that a great number of issues of great importance to this country have not been decided by the U.S. Supreme Court. In many cases, those cases are decided by circuit courts. In most cases, the writ of certiorari applied for at the U.S. Supreme Court is denied so that the decisions of the Circuit Court of Appeals stand.

Therefore, it is important to consider the importance of the nominating process for an appointment to the circuit court. I, for one, apply totally different standards to a nomination for life to the Federal court system than I would to that of a nomination by the President of the United States for someone on his personal staff or as a Secretary who would serve at his pleasure. The reason I have a different point of view is fairly simple. I think a President of the United States should be given the benefit of every doubt as it pertains to the kind of people that he wants to carry out and implement his policies.

But, Mr. President, when we appoint someone to a circuit court of appeals, or any other Federal court for that matter, we are putting someone on the bench for life who will, no doubt, decide hundreds and hundreds of cases involving the lives of Americans and, in the case of Professor Wilkinson, at the very young age of 39, for many, many years to come. So I think, when you come down to that kind of nomination, each Member of the Senate ought to apply his or her own personal standards to that judicial nominee.

Really, Mr. President, it is a copout to rely on the ABA. Anyone in this Chamber who has spent any amount of time in the courts ought to have some personal standards. I have mine, and I would like to discuss this gentleman's qualifications.

First, let me stipulate so there will be no misunderstanding that, from what I have learned of this nominee, he is of the highest character, of superior intellect, no doubt a legal scholar, and probably has a very bright future in teaching and possibly in the courts—certainly in the courts if he is confirmed by the Senate. So there need be no argument from this Senator as to whether or not this gentleman is of good character and of very, very high intellectual capability. But let us look at what he has done.

One of my colleagues on the floor earlier compared this gentleman to Justice Frankfurter, a comparison to which I think even Professor Wilkinson would probably blush if he were in the gallery.

This gentleman's qualifications are quite unusual. He graduated from a very fine law school. He was an editor

Senator **Specter**. One other point that I do want to cover. I regret the absence of Justice Powell today, and I think it inappropriate that he is not here.

In the unanimous-consent agreement entered into on the Senate floor, Justice Powell was listed as a specified witness. I do not believe that there is any question here about opening the door, nor do I believe that there is any question here about separation of powers. If the issue were one of Justice Powell's judicial opinions, it would be unthinkable and wholly inappropriate for this committee, or anyone, in a formal way, to question a Supreme Court Justice on what the Supreme Court Justice had done. But in this proceeding, Justice Powell is a fact witness, and he is a witness who has injected himself into the proceeding. And when Justice Powell writes in a terse form that he has nothing to add, it is my judgment that it is up to this committee and up to the Senate to decide what Justice Powell has to add.

When I heard about Justice Powell's letter last Friday, I wrote to Justice Powell, and I consider my letter to him to be of sufficient importance to put it in the record at this point. I wrote to him as follows, on August 3, 1984:

> I respectfully urge you to reconsider your declination of the Senate's request for your testimony on the pending nomination of Prof. J. Harvie Wilkinson. In my judgment, there are significant questions on which you have much to add. In the event you do not appear at the Tuesday hearing, I request that you respond in advance of 3 p.m. on Thursday, August 9, 1984, the time of the Senate cloture vote on the nomination, to the following questions, first:
>
> Prior to the time Mr. Howard first contacted you in December of 1983, did you have any contact with Mr. Wilkinson regarding his interest in or candidacy for a judgeship on the court of appeals?
>
> Have you had any subsequent contact with Mr. Wilkinson regarding your contacts with ABA committee members? Please specify.
>
> 2. Have you ever been contacted by former Deputy Attorney General Edward C. Schmults, former Assistant Attorney General, Jonathan C. Rose, or any official or employee of the Justice Department or the Administration, in connection with Mr. Wilkinson's nomination to the court of appeals? Please specify.
>
> 3. In your letter of March 12, 1984, to Senators Kennedy, Biden, and Metzenbaum, you stated that you called Mr. Lafitte "on my own initiative", but a Washington Post article of March 8, 1984, purporting to be based upon an interview with you, states that "Powell said that he was asked by one of the—other two ABA—callers to contact a third committee member and did so." Please clarify.
>
> 4. The evaluation criteria applied by the ABA Standing Committee on Federal Judiciary provide that "Substantial trial experience—as a lawyer or trial judge—is important for prospective nominees to both the appellate courts and the trial courts" and that for appellate court nominees, the committee may place "somewhat" less emphasis on the importance of "extensive trial experience".
>
> (a) At the time you wrote the March 12 letter, were you familiar with these criteria, and (b) would it be correct to assume, in light of Mr. Wilkinson's lack of trial experience, that your statement that Mr. Wilkinson is fully qualified to serve on the Court of Appeals was made outside of the context of the ABA's rules?
>
> 5. In an article published on April 9, 1984 in the Virginian Pilot, reference was made to a telephone interview with you in which you are reported to have said that suggestions that you pressured the ABA members to support Mr. Wilkinson were absurd. Did you consider the possibility that an unsolicited telephone call from a sitting U.S. Supreme Court Justice to a practicing attorney in New Orleans might, regardless of intentions, have the effect of exerting pressure?
>
> Did you perceive any distinction between offering your opinion as a Supreme Court Justice on the qualifications of a judicial candidate in response to an inquiry from an ABA committee member specifically responsible for soliciting comments, and offering your opinion on your own initiative to another committee member not responsible for seeking comments on the candidate's qualifications?
>
> Do you consider it as having an appearance of undue influence by evidence outside the committee's record for a commitee member to have received such a call?

6. You state in your March 12 letter that it is not unusual for Federal judges to be asked their opinion as to the qualifications of persons under consideration for appointment to the Federal Bench. In your experience, is it equally commonplace for Federal judges to offer such an opinion to an ABA committee member who has not requested it, and are you aware of any specific instances in which this has occurred in the past?

In closing, Mr. Chairman, my sense is that while the nomination of Professor Wilkinson is very important for reasons specified by Senator Mathias, there is an overriding issue here of even greater importance, and that is the procedures by which the American Bar Association makes its recommendations to this Judiciary Committee.

Thank you, Mr. Chairman.

Senator HATCH. Thank you.

Senator Metzenbaum wants to make an offer for the record.

Senator METZENBAUM. Mr. Chairman, in view of the fact that Senator Kennedy and I had sent a letter to Justice Powell on August 5th, and it has been referred to with some attachments, and I think it ties in with the comments of the Senator from Pennsylvania, at this time, I would suggest that the letter and the attachments be included in the record.

Senator HATCH. Without objection, we will place them in the record at this point.

[Material submitted for the record follows:]

STROM THURMOND, S.C., CHAIRMAN
CHARLES McC. MATHIAS, Jr., MD.
PAUL LAXALT, NEV.
ORRIN G. HATCH, UTAH
ROBERT DOLE, KANS.
ALAN K. SIMPSON, WYO.
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HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZ.
PATRICK J. LEAHY, VT.
MAX BAUCUS, MONT.
HOWELL HEFLIN, ALA.

VINTON DEVANE LIDE, CHIEF COUNSEL AND STAFF DIRECTOR
MARK H. GITENSTEIN, MINORITY CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

August 5, 1984

The Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
Washington, D. C. 20543

Dear Mr. Justice Powell:

We are disappointed that you have not accepted the invitation of the Senate Judiciary Committee to appear at the hearing next Tuesday on the nomination of J. Harvie Wilkinson III to be a judge of the United States Court of Appeals for the Fourth Circuit.

We appreciate your response to our initial inquiry on March 9 with respect to your role in the review of Mr. Wilkinson's qualifications by the ABA Standing Committee on Federal Judiciary. In order for the Senate to have as clear an understanding as possible of your role, we would appreciate your specific response to each of the specific questions we have attached.

Respectfully,

Ed Kennedy
Edward M. Kennedy

Howard M. Metzenbaum
Howard M. Metzenbaum

Questions on the Wilkinson Nomination

1. Please provide the specific dates of all of your contacts with James Howard, John Lane, and Gene Lafitte of the ABA Committee, as referred to in your letter to us of March 12, 1984.

2. Did you or any member of your family have any discussion with J. Harvie Wilkinson III or any member of his family about the nomination or about the ABA Committee investigation? Please provide the date and substance of any such discussion.

3. Did Mr. Wilkinson or any member of his family ask you or any member of your family, directly or through any other person, to contact anyone in connection with his nomination? Whom were you asked to contact, and did you make the contact? Plesae provide the date and substance of any such contact.

4. Did anyone else ask you to contact anyone in connection with Mr. Wilkinson's nomination? If so, please state (a) who asked you to make the contact, (b) whom you were asked to contact, (c) whether you attempted to make or were successful in making the contact, and (d) the date and substance of any such contact.

5. Please provide the date and substance of any discussion that you had with any of the following persons about the Wilkinson nomination or about the ABA Committee's investigation:

(a) Your present or former law clerks.
(b) Chief Justice Burger or other Justices of the Supreme Court.
(c) Judges of the Fourth Circuit.
(d) Officials of the Department of Justice.
(e) Other officials of the Reagan Administration.
(f) Any other individuals, other than James Howard, John Lane and Gene Lafitte, as mentioned in your letter to us of March 12, 1984.

6. Did you or any member of your family request or suggest that any person make any contact with respect to the Wilkinson nomination?

7. In addition to your contacts with Mr. Howard, Mr. Lane, and Mr. Lafitte, did you submit any written statement or material to the ABA Committee? If so, what was the date of the statement or material? Please provide a copy of any such statement or material.

8. Would you discuss your contact with Mr. Lafitte in light of the Canons of the Code of Judicial Conduct for United States Judges and Advisory Opinions Nos. 54 and 59, which appear to distinguish between initiating a contact and responding to inquiries, and which urge judges to "avoid pleading for or endorsing" the candidate.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

The Judicial Conference of the United States has endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. A judge should carefully consider whether the judge's membership in a particular organization might reasonably raise a question of the judge's impartiality in a case involving issues as to discriminatory treatment of persons on the basis of race, sex, religion, or national origin. The question whether a particular organization practices invidious discrimination is often complex and not capable of being determined from a mere examination of its membership roll. Judges as well as others have rights of privacy and association. Although each judge must always be alert to the question, it must ultimately be determined by the conscience of the individual judge whether membership in a particular organizaton is incompatible with the duties of the judicial office.

ANNOTATIONS

1. A judge may participate as a faculty member in a seminar of general interest, organized on a non-profit basis, where the content of the seminar is broadly based, is philosophic in nature, and is intended to promote discussion in depth among faculty and participants, provided that (a) the commitment will not interfere with his devotion to the expeditious and proper administration of official functions, and (b) the commitment will give no ground for any reasonable suspicion that his office persuades others to patronize or contribute to the institute. The judge is the one best able to circumscribe the content of his comments so as to avoid a positive commitment on any legal issue likely to arise before him. Advisory Opinion No. 3.

2. The practice of judges appearing as character witnesses should be discouraged, but, if

subpoenaed, a judge must respond to the subpoena. Suggestions for the guidance of the witness and the trial judge are contained in Advisory Opinion No. 9.

3. A judge's membership in a political club, in which he is not active, could be considered as giving the appearance of partisan activities. Accordingly, he should resign. Advisory Opinion No. 19.

4. For a judge to preside over a case involving a defendant who pays a substantial amount of rent, which eventually is credited to the judge's wife as the sole beneficiary of a trust managed by the lessor as trustee, would be reasonably subject to the claim of an appearance of impropriety on his part and to questioning his impartiality. Advisory Opinion No. 27.

5. In any controversy, whether before an administrative agency, court, or official, the question may arise as to the deference that may be accorded a hospital board which includes a judge in its membership. Such a judge should be quick to avoid the criticism that he is in violation of Canon 2B, "...[A judge] should not lend the prestige of his office to advance the private interests of others..." Advisory Opinion No. 28.

6. For a judge to withdraw from a case because of an economic or a family relationship and then reverse his conclusion that he was so disqualified could be viewed as irresponsible conduct and give the appearance of impropriety. Advisory Opinion No. 31.

7. A judge may accept a complimentary membership in a professional or social club, provided the club offers such membership to a broader group of public servants and that the conferring of the membership could not be attributed to a committee of attorneys

practicing before him whereby the membership could convey the impression that some lawyers are in a special position to influence him. Advisory Opinion No. 47.

8. A complimentary membership in a professional or social club, which exceeds the value of $100, must be reported on the Semi-Annual Report of Extra Judicial Income. Advisory Opinion No. 47.

9. To permit a law clerk to work on cases handled by a spouse's law firm may erode public confidence in the integrity and impartiality of the judiciary. Advisory Opinion No. 51.

10. There is no impropriety in a judge's sitting on a case involving an open-membership bar association of which he is a member. Advisory Opinion No. 52.

11. It is highly undesirable for a judge to approach an appointing official to initiate a recommendation for the appointment of another person to a judicial post. Advisory Opinion No. 54.

12. It would be advisable for a judge in contracting for any publication of his writings to retain a measure of control over the advertising so that it does not exploit the judicial position or use the prestige of a judge's office to advance the private interest of others. Advisory Opinion No. 55.

13. The evaluations of prospective candidates to judicial office may be given upon the request of the President and senators and their selection committees or commissions, but a judge should avoid pleading for or endorsing the final choice and appointment of a particular candidate he may recommend. Advisory Opinion No. 59.

14. A law partner of a judge's nephew should not be appointed by the judge to serve as a special master in a civil case. Advisory Opinion No. 61.

15. The Advisory Committee has prepared a review of the published and unpublished opinions that concern judicial disqualification and the appropriateness of various nonjudicial activities. Some sections of this review pertain to the subject of Canon 2, impropriety and the appearance of impropriety. Advisory Opinion No. 62.

16. A judge should not hire as a law clerk a son or daughter of a judge serving on the same court, but may hire as a law clerk the son or daughter of a judge of another court. If the courts are related, such as a district court and court of appeals in the same circuit, a judge should use care and discretion to avoid sitting in cases in which family connections might appear to influence decisions. Advisory Opinion 64.

17. It is normally inadvisable for a judge to make a personal recommendation for presidential commutation of sentence or pardon, or for parole, in response to a prisoner's request. Advisory Opinion No. 65.

18. Judges may with propriety attend seminars and similar educational activities organized by nongovernmental entities and may have the expenses of their attendance paid by such entities provided they have fully satisfied themselves that such activity is in accordance with the guidelines of the canons covering the acceptance of gifts and covering involvement of the entity in litigation. Advisory Opinion No. 67.

19. A judge should disqualify himself when his spouse has a financial interest, however small, in the subject matter in controversy or any other interest that could be substantially affected by the outcome of the proceeding. Advisory Opinion No. 68.

20. When a Panel has conferred but has not decided, and a judge finds that he or she is disqualified, the other judges may proceed to decide the case without the appearance of impropriety. Advisory Opinion No. 71.

21. Judges should insure that the title "judge" is not used in the courtroom or in papers involved in litigation before them to designate a former judge who has returned to the practice of law, unless the designation is necessary to describe accurately a person's status at a time pertinent to the lawsuit. Advisory Opinion No. 72.

ADVISORY COMMITTEE ON JUDICIAL ACTIVITIES
ADVISORY OPINION NO. 54

Propriety of a judge writing a letter of approbation or recommendation to an appointing officer.

Several judges have inquired as to whether the Code of Judicial Conduct for United States Judges bars them from writing letters on behalf of a judicial candidate. For the purpose of answering the inquiry, we make the assumption that there is no impropriety in a judge's answering a proper inquiry from an appointing officer with respect to his knowledge concerning the character and fitness of a candidate for appointment to any public office, including that of judge. We, therefore, deal with the question with respect to the voluntary initiation of a recommendation on behalf of an aspirant to a judgeship addressed to the appointing officer.

The possible Canons which bear on this question seem to be Canon 2B and Canon 7A(3).

Canon 2B provides:

> A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

In deciding whether to write a letter of approbation or recommendation to an appointing official on behalf of a friend or other person who aspires to a judgeship, a judge should determine whether such an act would "lend the prestige of his office to advance the private interests of others." He should also consider whether such an act might convey "the impression that /the applicant is/ in a special position to influence him." Furthermore, the heading of Canon 2 states that: "A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES." This requires that a judge should not place himself under such obligations to any other person as to permit the inference that such relationship might affect his impartiality in the performance of his duties. He should avoid asking any favors of a governor or other official with the power to appoint to judicial positions which either he or any impartial observer might reasonably feel would place him under obligations to such official.

Canon 7 deals with political conduct in general, and after forbidding certain specific acts, provides:

> (3) A judge should not engage in any other political activity [except those described in Canon 4, dealing particularly with activities to improve the law, the legal system, and the administration of justice].

A judge should not initiate a recommendation for another person to a judgeship if such act on his part can reasonably be interpreted as "engag[ing] in . . . [a] . . . political activity."

In short, the Code does not deal expressly with the question presented, but it is clear that there are several provisions of the Code that appear to make it highly undesirable for a judge to approach an appointing official to initiate a recommendation for the appointment of another person to a judicial post.

August 15, 1977

ADVISORY COMMITTEE ON JUDICIAL ACTIVITIES
ADVISORY OPINION NO. 59

Propriety of a judge giving evaluation of judicial candidate to screening or appointing authority.

The receipt by many judges of requests for recommendations of suitable potential judicial nominees from merit selection commissions has prompted the Advisory Committee to review its Advisory Opinion No. 54, dated August 15, 1977.

In that opinion note was taken of Canon 2B's admonitions against lending the prestige of judicial office to advance the private interests of others and against conveying the impression that others are in a special position to influence one, as might be the case if a judge were to seek as a favor the appointment of someone from an appointing authority. Also mentioned was Canon 7(3) and its proscriptions against engaging in political activity.

The conclusion was that while there is no impropriety in a judge's answering a proper inquiry from an appointing officer with respect to his knowledge concerning the character and fitness of a candidate for appointment to any public office, including that of judge, a judge should not "approach an appointing official to initiate a recommendation for the appointment of another person to a judicial post."

Insofar as giving recommendations and evaluations of prospective judicial candidates is concerned, the above advice is now considered too restrictive. The Advisory Committee accepts the premise that, as judicial selection processes become more institutionalized and with wider participation, judges have a responsibility to communicate their recommendations and evaluations to the appointive authorities -- the President and Senators -- and their selection committees or commissions. In other words, the cautions of Canon 2B are entirely consistent with a positive duty of judges to communicate their evaluations based on experience to the end that the public interest in a judiciary of quality and integrity be realized.

Therefore, not only may a judge properly answer inquiries concerning a particular candidate, but he may also properly respond to requests from appointing authorities and their screening committees for suggested names. He may also submit suggested names if he understands that such are being solicited, even though no specific request has yet been addressed to him. A judge should also respond affirmatively to requests from or on behalf of the appointing authorities to evaluate candidates insofar as the judge's knowledge of the candidates permits.

The strictures of Canons 2B and 7(3) come into play in supplying guidance as to the manner of communicating any recommendation or evaluation. They imply that any opinion be and appear to be directed only to factors relevant to performance of the judicial office, that the judge's views should be objective and informative and avoid pleading for or endorsing the final choice and appointment of the candidate he may be recommending as opposed to all others, and that the judge should not lend his name to any publicity campaign for any candidate.

April 16, 1979

Senator HATCH. Senator Biden?

Senator BIDEN. Thank you, Mr. Chairman.

I would like to make two comments. First of all, the fact that I am sitting to the left of Senator Metzenbaum is purely coincidental; I would like to begin by indicating that.

Secondly, I would like to point out that I have a statement, and I would like to ask that it be inserted in the record in its entirety.

Senator MATHIAS. Will the Senator yield?

Senator BIDEN. Yes, I will.

Senator MATHIAS. The fact that I am sitting to the right of the Senator from Utah is equally coincidental. [Laughter.]

Senator BIDEN. I think that should be noted also.

Senator HATCH. It is an historic occasion, that is all I can say. Without objection, we will place your statement in the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. Chairman, to some extent this hearing constitutes general oversight of the American Bar Association's procedures in rating judicial nominees. But as the witness list makes clear, what this hearing is really about is the controversy surrounding Mr. James Harvie Wilkinson's rating of "qualified" by the ABA.

We are here today to clear the air on two matters of great importance regarding the nomination of Mr. Wilkinson. The first of the major issues this committee must address is the nature and extent of Mr. Wilkinson's alleged lobbying of the American Bar Association's Standing Committee on the Federal Judiciary. If such lobbying did occur, we must then ask (1) whether Mr. Wilkinson's engaging in lobbying reflects poorly on his temperament to be a Federal judge, and (2) whether his lobbying influenced the ABA committee's decision to rate him "qualified".

The second major issue the committee must address is whether the ABA has violated its own guidelines regarding the experience necessary to be a Federal judge, and if so, whether Mr. Wilkinson has demonstrated qualities that would merit his "qualified" rating in spite of those shortcomings.

Mr. Chairman, I do not believe we can say with certainty at this time whether Mr. Wilkinson is qualified to serve on the United States Court of Appeals for the Fourth Circuit. The reason is that the record on Mr. Wilkinson is incomplete. That is why I supported the motion to recommit the nomination to this committee for the purpose of holding another hearing, and that is why I felt compelled to vote against cloture.

I do not believe that lack of trial experience in and of itself should necessarily disqualify a judicial nominee, especially where the nominee has demonstrated an unusual proficieny in the law and an ability to overcome that inexperience.

But I do believe that issues have been raised regarding Mr. Wilkinson that, if not resolved to my satisfaction at this hearing, will compel me to vote against his nomination.

I would like to thank the distinguished chairman of this committee, Senator Thurmond, with whom I have worked closely on so many issues, for his cooperation in allowing for this hearing.

Senator BIDEN. And Mr. Chairman, to some extent, this hearing constitutes a general oversight of the ABA's procedures in rating judicial nominees, but as the witness list makes clear, what this hearing is really about is the controversy surrounding Mr. Wilkinson's rating as "qualified" by the ABA.

We are here today to clear the air on two matters of great importance regarding the nomination of Mr. Wilkinson. The first of the major issues this committee must address is the nature and extent of Mr. Wilkinson's alleged lobbying of the American Bar Association's Standing Committee on the Federal Judiciary. If such lobbying did occur, we must then ask: One, whether Mr. Wilkinson's engaging in such lobbying reflects poorly on his temperament to be a

Federal judge; and two, whether his lobbying influenced the ABA committee's decision to rate him qualified. The second major issue the committee must address is whether the ABA has violated its own guidelines regarding the experience necessary to be a Federal judge, and if so, whether Mr. Wilkinson has demonstrated qualities that would merit his qualified rating in spite of those shortcomings.

And as I indicated, I would like the remainder of my statement inserted in the record as if read.

Senator HATCH. We do have it in the record.

Senator East, we will turn to you.

STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. Thank you, Mr. Chairman.

Senator METZENBAUM. He is on the far left; is that it?

Senator EAST. Well, for clarification, I am sure everybody knows that your humble servant, Mr. Chairman, actually belongs on the other side of the aisle.

Senator HATCH. You look very comfortable over there, sitting by Senator DeConcini. [Laughter.]

I notice you have gotten as far away from Senator Metzenbaum as you can get. I enjoy sitting by Howard. It is always an enlightening experience, no matter what he says or does.

Senator EAST. I am sitting on the far left of the Democratic Party, which normally is not my general posture in the U.S. Senate, but these are distinguished gentlemen, and I am happy to be associated with them. It is merely a practical problem of getting my wheelchair around the circle with the congestion.

Senator HATCH. What is that Latin phrase: "Res ipsa Loquitur"?

Senator EAST. So, I appreciate the opportunity to speak briefly on this nomination, which I have fully supported from the outset after examining the record. I think he is a nominee of impeccable credentials.

I would like to point out first of all, in terms of his educational experience, that Professor Wilkinson is a graduate of Yale University; he graduated Phi Beta Kappa, he graduated magna cum laude, and he was named "Scholar of the House With Exceptional Distinction." He graduated from the University of Virginia School of Law. He served on the Law Review there, which anyone who has been to law school knows is one of the highest achievements one can make, and he served as notes editor. He was named to the Order of the Coif, which is confined to the top 10 percent of the graduates of the class.

In sum, he has had a distinguished academic record of the highest quality.

Second, based upon that, he was made a clerk to a U.S. Supreme Court Justice. Anyone who has been to law school knows that is probably the highest honor that can be accorded a law graduate.

He has, among other things, served as a Deputy Assistant Attorney General, in the Civil Rights Division at the U.S. Department of Justice, with 50 attorneys under his supervision, which I think can attest to the question of his practical experience.

Professor Wilkinson has moved readily up the academic ladder at the University of Virginia Law School, one of the most prestigious in America and, I might note, the alma mater of Senator Edward Kennedy.

He was assistant professor of law, then associate professor of law. He is now a full professor of law, tenured at the University of Virginia Law School. Anyone who has been to law school and knows the problems of the academic community, to become a tenured professor at a school of law of as great prestige as the University of Virginia is a major accomplishment of the first order. And I would pause there simply to stress the importance of that.

Now, Professor Wilkinson's qualifications are impeccable. As regards certain allegations here about "undue influence", I do not think that the record bears it out, and I think that it does a disservice to the nominee to suggest that it does.

I think that Mr. Buesser of the American Bar Association, in his letter dated, I believe, March 12th 1984, to the honorable Senator Strom Thurmond, has fully answered that question.

The members of the ABA Committee do not act like a sequestered jury. They are frequently contacted; they contact others. They must gather information and data. And they followed their usual procedures. Mr. Buesser makes that as clear as one can make it with the English language. And there was no undue influence.

As regards this question of practical experience, I think that the evidence before us has shown that Professor Wilkinson has had practical experience, and I think it also ought to be remembered that academic experience is at least equal to and, in the case of appellate court judges and U.S. Supreme Court Justices, might well be superior to that of merely "practical experience".

I detect somewhat in this objection to him an antiintellectualism, which is unfortunate. I, for example, would note that my best friend in law school has built up an established practice of a civil nature, and he is considered in one of the States of this country as the leading expert on condominium law. Would he be better qualified to serve in this position? I submit not, because as Oliver Wendell Holmes put it, teaching law in "the grand manner" is probably the single best qualification one could have to serve on the court of appeals level and to serve on the U.S. Supreme Court, where you need the broad view, the historical view, and the philosophical view.

And indeed, then, I would submit that having had the experience in law teaching and the deep and great respect for the academic community there, and certainly for his colleagues at the University of Virginia, I would submit that his experience is superior to those who might have been engaged in narrow practice over a long period of time. As the old expression goes, law practice sharpens the mind by narrowing it.

I think that Justice Powell's remarks were very appropriate in his letter to this committee, and I think there is no reason for him to appear before us as a witness. And, as a matter of the separation of powers, I think it would be inappropriate.

Justice Powell says in his letter to Senators Kennedy, Biden, and Metzenbaum, "In view of your inquiry and your proper interest in Mr. Wilkinson's qualifications, I can say with confidence that of the some 45 fine clerks I have had in my 12 years on the Court, J. Harvie Wilkinson, III ranks among the best. He is an exceptionally gifted legal scholar, and a compassionate and thoughtful human being. In my opinion, he is fully-qualified to serve on the court of appeals." His opinion should certainly be treasured.

I finally would end on a couple of quick points, Mr. Chairman, because I know our time is brief. First of all, I think Mr. Buesser's letter from the ABA is comprehensive, complete, as much as one could possibly ask. I would also remind those here that the American Bar Association's standards have been followed. I would note that we are not required, under the Constitution or the procedures of our own committee, to follow the ABA's recommendations anyway. So if we do not wish to abide by their procedures and their standards and what they are offering, then let us cease and desist from asking them. I think to bring them in here and to impugn their motives and integrity, and to impugn them in terms that they were subjected to "undue influence" does a great disservice to a great national professional organization. That leads me to my final point here.

I think that what we see—and I want to state this carefully and judiciously—I think we see politics intruding here—not partisan politics, because I would note that Senators DeConcini and Howell Heflin of the Democratic Party have voted for this nominee, as well as other Democrats on the floor—I am not implying that. I am implying that there may be some sort of philosophical political objection here, which is never really articulated or made clear—those are the ulterior motives, and we are simply precented with this facade of "undue influence," and "lack of practical experience".

I would remind the nominee that I think he is caught up in the politics of a Presidential election year. And my distinguished colleague from Arizona, Senator DeConcini, for whom I have the deepest respect, I think hints at that in his somewhat, I think, unnecessary aside in terms of the assault upon the Reagan administration.

I think really what is at issue here is politics in a Presidential election year. The ABA is not on trial, nor is Mr. Wilkinson on trial. I think the ABA has fulfilled their professional responsibility. I think Professor Wilkinson is a man eminently qualified for this position, and I regret, Mr. Chairman, and I fear in the long run, that we are going to find that people of the quality of Mr. Wilkinson will not allow their names to be submitted for public office because of what they must go through publicly in terms of impugning their personal integrity. And the quality of candidates for judgeships at all levels, let alone service in the Cabinet, let alone other service in the Federal Government, is going to degenerate, because men of this quality will not subject themselves to this kind of public abuse and embarrassment. And I think that it reflects adversely on the U.S. Senate, I think it reflects adversely on the Judiciary Committee and our official obligation under the Constitution to give advice and consent on Presidential appointments.

I would like to note that Mr. Wilkinson got 57 votes on the Senate floor, which is a very healthy majority. The problem is we did not have the 60 votes required for cloture. But he clearly has the confidence of the U.S. Senate, he clearly has the confidence of the ABA, and he clearly has the confidence of anyone who has had any contact with the gentleman. I think he deserves to be confirmed by the U.S. Senate, and I do hope that he ultimately ends up on the court of appeals of the fourth circuit, of which my home State of North Carolina is a part.

It is a great honor and a pleasure to be associated with this man, and I will do everything I can on this Committee and on the Senate floor to argue for his confirmation. I think the record warrants it.

Thank you.

Senator **Metzenbaum**. I would like to correct my colleague. Mr. Wilkinson did not get 57 votes. That vote was on a cloture motion. And it is a fact that there are certain members of the Senate who always vote for cloture as a matter of policy.

How many votes Mr. Wilkinson will get when he is up for confirmation is yet to be determined.

Senator **East**. I am confident that he will get the majority.

Senator **Hatch**. Senator Trible, we will turn to you and recognize you at this time.

STATEMENT OF HON. PAUL S. TRIBLE, JR., A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Trible**. I thank you for the opportunity to join you this morning.

The chairman in his opening statement has properly set the stage for this hearing. I believe that J. Wilkinson is eminently qualified to serve in the Fourth Circuit Court of Appeals. He will distinguish the Federal Bench, and he will distinguish the Commonwealth of Virginia.

I am pleased that this hearing has been scheduled for today, because it will ensure the prompt resolution of this matter. Whatever the outcome, it is time to bring this matter to a close.

Mr. Chairman, I think it is fair to say the nomination has been frustrated by three powerful forces that bear no direct relationship with the qualifications of this candidate. There are those who have philosophical objections. Jay Wilkinson is a bright, articulate conservative who will leave a lasting mark, and that causes some unease in the minds of some of my colleagues. I understand that.

Moreover, there are those in the Senate who are concerned about ABA procedures, the way the ABA goes about investigating and recommending people for the Federal bench. Senators Specter and Mathias have genuine concerns about these procedures, and they are entitled to an opportunity to address those concerns here today.

Finally, there is the factor of election year politics. This phenomenon has been brought home to me in very powerful ways by my colleagues. Every 4 years, the party out of power attempts to slow down the nomination process, hoping they will be swept into power in November. I understand that, but it is a factor which in no way bears on Mr. Wilkinson's fitness.

Although hearings generally raise far more questions than they resolve, it is my hope, indeed, my expectation, that these hearings will ensure the broad, bipartisan support that this nominee deserves and that is required for this confirmation.

I therefore welcome this opportunity, and I am pleased that it will lead to final resolution, and I thank my colleagues for their invitation to appear today.

[Whereupon, Senator Thurmond resumed the chair.]

The CHAIRMAN. The distinguished Senator from Alabama, Mr. Heflin.

Do you have an opening statement, Senator?

Senator HEFLIN. Thank you, Mr. Chairman. I am here to listen.

The CHAIRMAN. I believe that completes the opening statements.

Now, there were two witnesses, Mr. Floyd Abrams and Mr. William Van Alstyne, who desired to testify, but since Senator Kennedy objected to them, we will leave them off and proceed with Mr. Edward Schmults, former Deputy Attorney General of the United States; and Mr. Jonathan Rose, you were next. If you want to come up to the table, too, that will be all right.

It might be well to swear you, gentlemen, so there will be no question. Please stand up and be sworn.

Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SCHMULTS. I do.

Mr. ROSE. I do.

The CHAIRMAN. Have a seat, gentlemen.

STATEMENT OF EDWARD C. SCHMULTS, FORMER DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND JONATHAN C. ROSE, FORMER ASSISTANT ATTORNEY GENERAL

Mr. SCHMULTS. Thank you, Mr. Chairman.

I would like to express my appreciation to the committee for permitting me to testify first this morning. As you know, I flew here late last night from Chicago, where I was attending the annual meeting of the American Bar Association. At 2 this afternoon in Chicago, I must present a paper to the public utility law section of the ABA, so I am quite anxious to return and carry out my obligation there.

Mr. Chairman, I have a brief statement I would like to make on the nomination of Jay Wilkinson to be a judge of the Court of Appeals for the Fourth Circuit. You may be sure it is brief, because I wrote it out in longhand this morning at the breakfast table.

The CHAIRMAN. You may proceed.

Mr. SCHMULTS. As this committee knows, I served as the Deputy Attorney General of the United States from the beginning of this administration to February 3, 1984. In that capacity, I was actively involved in the administration's judicial selection process and worked very closely with the ABA Standing Committee on the Federal Judiciary. In particular, I was actively involved in the selection of Jay Wilkinson.

Before turning to what I understand are the concerns of some members of this committee, I want to state for the record my personal conviction that Jay Wilkinson is superbly qualified in every respect to be a Federal appellate judge. I base my recommendation on nearly 2 years of professional association with Mr. Wilkinson and 3 years of reviewing at the Department of Justice the qualifications of 90 or more persons who now sit on the Federal bench.

The CHAIRMAN. If you do not mind, I am not sure the people in the back can hear you. Would you pull your microphone up a little bit, please, and speak a little louder?

Mr. SCHMULTS. Yes, sir.

I realize that this committee has already favorably reported the Wilkinson nomination, but I wanted to endorse Mr. Wilkinson at this time because all too often in Washington, we get tangled up in the process—in this case, who did what to the ABA committee—and lose sight of a fundamental issue in the nomination process, and that is, we are dealing with a human being and his or her family—in this case, a very fine human being, indeed.

Turning now to the relationship between the ABA committee and the Department of Justice, I would note first that the committee performs an extremely valuable public service in reviewing judicial nominations—a valuable public service not only to the Department of Justice, but to this committee and indeed, to the American people. This takes the members away from their practices for substantial periods of time, and we are all in their debt for their service.

I cannot emphasize enough, on the basis of 3 years' experience, that the members of the committee are senior members of the bar, persons of great stature in the legal profession—tough litigators, if you will—and experienced in weighing fact and opinion. They make up their own minds on judicial candidates on the information before them, and no one who knows a member of the ABA committee could believe that the member could be pushed around or persuaded to vote on a candidate in a manner contrary to the member's own best judgment.

While the ABA committee is totally independent in every respect, this is not inconsistent with constant communication back and forth with the Department of Justice on judicial candidates. Mr. Rose and I, for example, would regularly attend portions of the committee meetings at the ABA's annual and midyear conventions. They met, I believe, 2 days ago, and Carol Denkins, my successor at the Department of Justice, again met with the committee.

For example, because the ABA is not subject to the Freedom of Information Act, persons interviewed may be more candid with the American Bar Association than they would be with the Department of Justice or the FBI. Where necessary, the ABA committee would advise the Department of relevant information, in each case, I stress, maintaining the confidentiality of the source of the information.

More than once, Mr. Rose and I have met with members of the ABA committee in my Department of Justice conference room on a Saturday morning to review the status of prospective judicial nominations. At one meeting, the candidate was there, and had the opportunity to respond to allegations made to the ABA committee. Again, as always, the confidentiality of the sources was maintained by the committee. Both we at the Department of Justice and at the ABA committee felt such a meeting was desirable as a matter of elemental fairness.

At another meeting, again on a Saturday morning, I met—and Mr. Rose was there—with four members of the ABA committee, and they outlined their concerns about a candidate the Department was considering. I agreed with them that their concerns were disqualifying and stated at the meeting that the administration would not proceed with the candidate. Another candidate was selected.

I cite these examples to make the point that the ABA committee, while independent in every respect, is not isolated from the Department of Justice, nor should it be. Moreover, the Department is not a passive bystander in the judicial selection process. I believed it was essential with respect to every candidate to provide all relevant information to the ABA committee. Indeed, the more relevant information the committee has before it, presumably, the better its evaluation. And so, in my opinion, the Department of Justice has the obligation to maintain the flow of all relevant information to the ABA committee on the Federal judiciary.

In fact, this is what occurred during the Wilkinson review process. We became aware at the Department that the upcoming ABA committee vote on Mr. Wilkinson might not be favorable. We were also aware that, to our knowledge, no one in the Department, certainly, those to whom Mr. Wilkinson reported—that would be Brad Reynolds, myself, and the Attorney General of the United States—had been interviewed by the American Bar Association. As you know, Mr. Wilkinson had served for nearly 2 years in the Department, and we believed our views of his professional competence were relevant. We also understood that other persons with relevant knowledge of Mr. Wilkinson—some truly distinguished professionals—had not been interviewed. We thought this was an oversight and sought to make certain that the information available to the members of the ABA committee was supplemented. I believed at the time and still believe that such action is not only appropriate, but obligatory, on the part of Department of Justice officials responsible for the administration's judicial selection process.

As we know, the ABA committee, on the basis of all relevant information, found Mr. Wilkinson by a substantial majority, qualified for appointment to the fourth circuit. I have no doubt whatsoever that this was a wise decision, arrived at by a fair process, in the exercise of the bona fide best judgment of each member of the committee, for whom I have the greatest respect.

I would be happy now to answer any questions you may have.

The CHAIRMAN. Mr. Rose, would you care to make a statement on this matter?

Mr. ROSE. I do not have a prepared statement, Mr. Chairman, but I would just like to make one or two brief remarks out of consideration for Mr.——

The CHAIRMAN. I would like to ask you to discuss these points: The nature of your relationship with Mr. Wilkinson at the Department, and specifically, what qualifications Mr. Wilkinson possesses which led the administration to submit his nomination to the Senate; and then, what actions concerning this nomination transpired between yourself, the ABA, and Mr. Wilkinson. If you could cover those points, it would be helpful.

Mr. ROSE. Yes, sir, I will try to do that.

I can only say that I fully support what former Deputy Attorney General Schmults has had to say about our relationship with the ABA, and Mr. Wilkinson's qualifications.

Second, in the statements of the two gentlemen who were not permitted to testify today, I think they express the view that I take toward this nomination, that it is one of the finest of this administration with which I have had the privilege to be associated.

Mr. Abrams, were he allowed to have said what he wanted to, said in testifying in support of Mr. Wilkinson's nomination:

> I find myself in the somewhat unaccustomed position of supporting the position of an Administration which, in areas relating to the administration of justice, I have not often found much to support.
>
> I support Mr. Wilkinson's nomination because I know him. I believe he is eminently qualified to serve as a judge of the United States Court of Appeals. I believe he is a man of honor, dignity, and high ability. I believe he would make a first-rate judge and that he should be confirmed.

The other gentleman, who is here today at his own expense, and prepared a lengthy statement——

Senator METZENBAUM. Mr. Chairman, Mr. Chairman.

The CHAIRMAN. Just a minute, Senator. What is your point?

Senator METZENBAUM. Do I understand that Mr. Rose is reading into the record a statement that witnesses were not permitted to make and thinks that that is an appropriate procedure for this committee?

Mr. ROSE. Well, I think the committee ought to have this information, Senator, yes, I do.

Senator METZENBAUM. Well, the committee decided they should not, and the chairman of the committee decided they should not, Mr. Rose. So, whether you think so or not, I consider it highly inappropriate for you to be reading their statements into the record.

Mr. Chairman, I object to his reading it.

The CHAIRMAN. Mr. Rose, you are referring to the statements of Abrams and Van Alstyne?

Mr. ROSE. Yes, I am, sir.

The CHAIRMAN. Well, Senator Kennedy, only wanted to have those who were against Mr. Wilkinson present today. He objected to statements by Mr. Abrams and Mr. Van Alstyne. I think those who are for Mr. Wilkinson speak for themselves, and you can just leave out those statements.

Senator EAST. Mr. Chairman, I have a parliamentary inquiry. I am curious that Senator Kennedy objected to William Van Alstyne and Floyd Abrams testifying. Mr. Van Alstyne is a professor of law at Duke University, in my State, and is one of the most distinguished legal scholars in the country. I wonder, as a matter of parliamentary inquiry, if I might ask why Senator Kennedy objects to him?

Senator METZENBAUM. Well, first of all, he is not here, but let me say that if he had not, I would have. We are here under a unanimous consent agreement with respect to hearing certain witnesses. And if we were going to hear additional witnesses besides those that were agreed to in the unanimous-consent agreement, then I think there are some other witnesses who would like to be heard for the opposite effect of Professor Van Alstyne and Professor Abrams.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. Senator Biden.

Senator BIDEN. I will be very brief.

In response to the Senator's inquiry, in addition to what the Senator from Ohio just stated, as I understand it, Senator Kennedy did not object to hearing these witnesses; he objected to hearing them now under this unanimous-consent agreement.

And I might add, Mr. Rose, it does not pay to be real cute now. I am inclined to vote for the man, and it is just this kind of cute malarkey that is the reason we have to have another hearing. Do you know what I mean? You are being too cute. You are outsmarting yourself by one. Why don't you just play it straight——

Mr. ROSE. I am not trying to outsmart myself. They were very upset that they were not allowed to be heard, that is all.

Senator BIDEN. They were very upset that they were not allowed to be here, but you have taken it upon yourself, in spite of what you heard twice this morning sitting back there, that their testimony was not going to be admissible today, you decide, through a cute procedure, to put it in. I, quite frankly, think we should hear their testimony. But do not be so cute. We are tired of cute witnesses. All right?

Mr. ROSE. Fair enough.

The CHAIRMAN. All right, let us proceed now.

Under the unanimous consent agreement, only those witnesses who are listed there would be allowed to testify. Otherwise, we will broaden the field on both sides too much.

Mr. ROSE. I will make my own statement, then.

The CHAIRMAN. The committee has already recommended this man favorably more than 2 to 1, but Senator Kennedy wanted to bring in some who were opposed to him, and so they will have a chance today to state their opposition.

Senator East, I can understand how you feel about this distinguished law professor from your State, but since his name was not on that list, I think we have to abide by that unanimous consent agreement.

All right, you may proceed, Mr. Rose.

Mr. ROSE. In terms of my own relationship with Jay Wilkinson, I worked with him on a number of projects in the Department, in the civil rights area, and I found him to be a legal scholar in that field and in a number of others, of unsurpassed eminence.

His record, I think, speaks for itself, and I will not repeat it, as it has been repeated here a number of times before. On the basis of his academic record, I think he compares very favorably with a number of the people who are highly qualified from the academic community that both this administration and the last administration have submitted for consideration for appellate court appointments to the Federal bench. I think he will make a superlative appellate judge.

I would be glad to respond to questions about my relationships with the ABA, because I think that might take less of the committee's time.

The CHAIRMAN. Thank you very much.

I think, in view of so many here, in propounding questions—some may not have any questions—but we will limit each Senator to 10 minutes. I will now just ask a few questions, and I will not take my full 10 minutes.

Mr. Schmults, you were the Deputy Attorney General. You were the highest man in the Justice Department next to the Attorney General, Mr. Smith. And Mr. Rose held a prominent position and studied the qualifications of judges and had that responsibility.

I want to ask you this. In your professional opinion, and from your experience in the Justice Department, and as a prominent lawyer and a prominent member of the American Bar Association, is there any question in your mind that Mr. Wilkinson is qualified to fill this position on the circuit court of appeals?

Mr. SCHMULTS. None whatsoever, Mr. Chairman. As I said in my statement, I think he is superbly well-qualified and will make an outstanding appellate judge.

The CHAIRMAN. Would you mind just capsuling very quickly, without too much repetition, why you feel that way?

Mr. SCHMULTS. Well, I think the record today has been well-documented by Mr. Wilkinson's outstanding academic credentials, his teaching abilities, his experience as a clerk to a Supreme Court Justice, his work as a senior official of the Department of Justice—in one of the litigating divisions, and his work on a newspaper. Indeed, I think Mr. Wilkinson has that breadth of vision and that wide-ranging experience that will make him a superb judge; the sort of experience that Judge Learned Hand and Justice Oliver Wendell Holmes used to talk about. The judiciary needs people—like Mr. Wilkinson—having breadth of vision, a sense of history, a sense of fairness, of compassion, and outstanding legal talent. And for all of these reasons, I think Jay Wilkinson is going to make a very fine judge.

The CHAIRMAN. As a matter of fact, isn't a member of the circuit court of appeals' position one of legal research and writing, more than the trial of cases?

Mr. SCHMULTS. Well, that would certainly be right. I do not minimize the desirability of having trial experience, and indeed I met with the ABA committee at one meeting, called for the purpose of discussing the application of their guidelines. The committee is made up largely of trial lawyers, and they do give great weight to trial experience. But it is only a guideline, and people who are distinguished for other reasons can obtain qualified ratings from the ABA, even though they do not have years of trial experience, or indeed, any trial experience at all. And there are some very fine judges now sitting on the Federal courts who have had little or no trial experience. Indeed, one could look at how much trial experience a great Justice like Felix Frankfurter had.

So what you have to weigh are the person's total qualifications, total competence and range of experience, not only in the legal profession, but more broadly.

The CHAIRMAN. Mr. Rose, since you worked with the judges and their qualifications a great deal, how do Mr. Wilkinson's credentials and qualifications compare with other nominees to circuit courts?

Mr. ROSE. I think they compare very favorably, Mr. Chairman. You have to recognize that there are generic types of people that one looks at for appointments to the circuit court, and generic types of backgrounds. One of these groups consist of sitting trial judges, a group in whose experience and competence for appellate service I firmly believe; a second group consists of very experienced trial lawyers. Obviously, people with those backgrounds have considerably more trial experience than a number of appointees of both this administration and the last to the circuit courts of appeals. On the other hand, there have been some great judges throughout our history who have had very limited or no trial experience at all. I think we all would agree that they too have contributed greatly to the quality of Federal jurisprudence and its wisdom. Justice Frankfurter is one such example; Judge Breyer is another more recent example. I think Jay Wilkinson will be yet another example of law professors of little or no trial experience, who have had distinguished academic careers and backgrounds that qualify them for this kind of position.

The CHAIRMAN. I thank you very much. We will now pass on to other members of the committee for questions.

The ranking member of this committee, the distinguished Senator from Delaware, Mr. Biden.

Senator BIDEN. Thank you, Mr. Chairman, and thank you, Senator Metzenbaum, for letting me go next.

Welcome back, Ed. I kind of wish you had never left that table.

Mr. SCHMULTS. Thank you.

Senator BIDEN. I have some questions for you, and none of them are directly or indirectly meant in any way to question your integrity. I worked with you for 2 years up here, and 12 years as a U.S. Senator. I came away from our encounters and experience with as high regard for you as anyone I have ever worked with in any administration.

But what is at question here is not, quite frankly, so much Mr. Wilkinson, whom I probably will vote for, but the process. We have had over the last 4 years, and for the next several years, a significant infusion of new blood into the judiciary in raw numbers, and the ABA has played an increasingly important role because of the volume. They have always played an important role, but we rely on them a great deal. Although they are not determinative, their recommendations, to any U.S. Senator, are looked at very closely. And the series of events that preceded this day, relating to whether or not the ABA has been influenced and the propriety of such influence, if any is exerted, is an important sort of watershed for us to set straight here, both for us and for the ABA, quite frankly, because I for one, as a practicing attorney, and one who expects to be doing that again someday, I am very concerned about my profession, my former profession. It is not in such good standing these days, in the minds of many in the public.

Now, having said that, I want to start with the comment you made that members of the standing committee and high-ranking members of the ABA are men and women of influence and significant standing within their communities. I believe that to be true. But then you made a second statement where you implied that that makes them somewhat impervious to being influenced. It is my experience as a U.S. Senator that influential women and men are most influenced by similarly influential women and men.

I cannot think of a single member of the ABA who would not be impressed by a call from a Supreme Court Justice. I can think of thousands of machinists, I can think of tens of thousands of salespersons, I can think of hundreds of thousands of businessmen who couldn't give a damn whether a Supreme Court Justice called them. I mean that sincerely.

But I do not know a single lawyer who, if a Supreme Court Justice called him, and it was a close call, would not go with the Supreme Court Justice—especially the influential ones, who are the only ones who, in fact, are before the Supreme Court, by-and-large. They are the ones who rub elbows with the Supreme Court Justices at the ABA conferences. You do not have guys like Joe Biden when he was 29 years old at an ABA conference, having a Chief Justice saying, "Let's go to dinner." But you do have the president of the American Bar Association, the chairman of the standing committee; they are the people who want the Justices to look favorably upon them.

So I would argue that, in fact, the most susceptible group in the world to lobbying by the Supreme Court would be influential members of the New York Bar Association, the Philadelphia Bar Association, the Cleveland Bar Association, et cetera. I just want to set that straight—when I say "straight" I mean this one Senator's perspective on it. That is why I am so concerned about this nomination. And that is why although in almost 3 years, you and I hardly had a disagreement—and that probably hurts your reputation more than it hurts mine.

Mr. SCHMULTS. That is why I had to leave town, Senator. [Laughter.]

Senator BIDEN. I suspect there may be some truth to that.

But anyway, that is why I want you to know why I am concerned about this. I mean, Dennis DeConcini and I were sitting here, saying that it is a good thing neither one of us wants to be on the Federal bench, because with an academic record like Mr. Wilkinson's, I mean, it is outstanding. He probably would not have spoken to me in law school; he would have had to go through too many people to get down to where I was. I would have wanted to speak to him, or at least borrow his notes. [Laughter.]

At any rate, that is why—and I realize I am taking the largest portion of my time here making a statement rather than asking questions—but that is why we are concerned.

And Mr. Rose, once again, if this were a court—and in effect, under our system, this is in effect a court of sorts—if this were a court, and the judge ruled evidence inappropriate, and you attempted to get it in knowing full well what you were doing, you would be held in contempt of court. That is why I find your action so contemptuous. It is a contemptuous action as it relates to the authority and the procedures of the U.S. Senate, which I, for one, happen to hold in high esteem and high regard—separate and apart from the men, including myself, and women, who sit here. That is what I find contemptuous about what you attempted to do.

So, I want to set those two things straight and get them off my chest, and now, to the one question, the one main question I have for you, Mr. Schmults. And that is, why did you feel you had to call anybody at all in the bar association, on any committee, about Mr. Wilkinson?

Mr. SCHMULTS. Well, let me say first that I appreciate very much your preliminary words, and you know that I valued greatly working with you while I held office here in Washington.

The point I was trying to make, Senator Biden, was that there was a constant flow of communication back and forth with the ABA committee. We were always talking with the chairperson of the committee about the status of our judicial candidates. Obviously, one hopes in the Department of Justice that the process can run reasonably fast, and we were constantly held up, by the time it took the FBI to complete various background investigations or the ABA committee to complete its evaluations. So we were always interested in having the process run thoroughly, but run with reasonable dispatch. So there was a lot of communication.

When the ABA committee would come upon areas of concern, they would frequently call them to our attention. We would meet with them; sometimes we would provide additional information to them. There were other times, as I said, when we had a meeting with them, when the candidate was right there at the table, and the ABA would present some of the allegations that they had heard, and the candidate had a chance to respond. In my view, that was a very fair, thorough process that served the public interest.

With respect to the Wilkinson nomination, I personally was concerned; since I had worked closely with J. Wilkinson for 2 years, I would have thought that a careful investigation would have had somebody call me and ask me what I thought of Jay Wilkinson. Someone should have called Brad Reynolds. Someone should have called the Attorney General. I say that not in any criticism of the ABA, because as we all know, no process can run perfectly. I happen to think that was an oversight. I have no reason to think it was anything else.

So I, and others, desired to provide information that we thought would be relevant to the ABA committee in exercising their best judgment. I agree with you, a call from a Supreme Court Justice would obviously be thought by a prominent lawyer to be a very important call.

Senator BIDEN. Do you think it appropriate for the Justice to call?

Mr. SCHMULTS. Please let me just finish. On the other hand, it seems to me that as Jay Wilkinson clerked for Lewis Powell for a year and a half, Justice Powell would have information that I would have thought that the committee would have desired, and should be able to weigh.

I cited the experience and the character and the integrity of the members of the ABA, not that they could not be influenced as such, but that they would only be influenced in a perfectly proper, appropriate way, and would make the decisions on the evidence before them. We are all influenced in a sense by the information we receive. I believe it is the obligation of the Department of Justice, if we believe there is relevant information out there, and we know the committee does not have it, to be sure that the committee gets that information. I do not believe that is inappropriate, I do not believe it is improper, and indeed, I believe, as I said, it is obligatory on the Department to make sure that happens.

Senator **Biden**. You were the No. 2 man in the Justice Department. Do you believe it would be appropriate for me as a U.S. Senator to pick up the phone and call a general or admiral at the Pentagon and tell them why I thought the Du Pont Co. was such a good and honorable company, the best in its field—which they probably are, in certain areas—and say to them, "You have a contract. One of those persons bidding on the contract is the Du Pont Co." I happen to be the ranking member of this committee, the No. 3 person on the Intelligence Committee, No. 2 on the Foreign Relations Committee, and No. 3 on the Budget Committee—all of which affect those boys in the Defense Department. How would you respond at Justice to Biden calling the person who makes the judgment on the awarding of a contract, if I were to call on behalf of the Du Pont Co. in my State, to tell them what a fine company it is, and that although it is not in the bid specification, in fact, I know them, I know that they work harder than other companies, I know that the bid cannot reflect all of what is in the background of the company, et cetera.

What would you have thought of that? My time is up, and that is my last question.

Mr. **Schmults**. All right. In a sense, Senator, those questions are in the bid specifications of the ABA Committee on the Judiciary. They are really charged, I believe, in going out and soliciting opinions and information from those people who have information about the character and integrity of a prospective nominee. I do not believe that the question you have put to me is at all similar. It seems to me——

Senator **Biden**. Well, I would argue that it is, because, in fact, in light of the phenomenal cost overruns that occur, one of the questions that fall within the purview of awarding contracts, which are not all on a low-bid basis, as you know, is whether or not the company can deliver, whether they mean what they say, what their management is like, do they follow through. I mean, forget about whether or not it is an appropriate comparison.

What would you have done if there were a complaint made—which I am sure there would have been—that I had inappropriately interfered in that way? Would you have felt obliged under the law, as the Deputy Attorney General, to conduct an investigation into the degree to which I was attempting to influence the Defense Department?

Mr. **Schmults**. Well, when you say "interfered," I guess you assume the conclusion, but it seems to me that——

Senator **Biden**. Whether I interfered.

Mr. **Schmults**. Yes. It seems to me if you have information that is significant in evaluating whether the Du Pont Co. is going to be a good contractor, I do not see why you should not provide that to the Pentagon.

Senator **Biden**. OK. Thank you very much for letting me go over, Mr. Chairman.

The **Chairman**. The distinguished Senator from Maryland, Mr. Mathias.

Mr. **Rose**. Mr. Chairman, may I just make one statement, that if anything I have said or done here this morning has indicated any kind of disrespect for this committee, I should like to withdraw it. I have the highest respect for this committee, and I just simply wanted to indicate the length and breadth of Mr. Wilkinson's support. I thoroughly apologize for any action——

The **Chairman**. We have always found you very fair in dealing with the committee, Mr. Rose.

Mr. **Rose**. Thank you.

Senator **Heflin**. He has probably got too much trial experience. [Laughter.]

The **Chairman**. Senator Mathias.

Senator **Mathias**. Mr. Chairman, I think perhaps the greatest probative value that I can offer the committee would be to welcome Mr. Rose; to tell Mr. Schmults we miss him, and to assign my time to Senator Specter—which I think can be added to his time and in his regular order.

The **Chairman**. All right.

Senator **Mathias**. Senator Specter would like to proceed now on my time.

Senator **Specter**. May I proceed on his 10 minutes now, Mr. Chairman?

The **Chairman**. Well, we will come to you in due time. In other words, we will take you according to seniority.

Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Schmults, I want to join Senator Biden in indicating my respect for you. I do have great respect, and I am sorry that you have left the Department, because I think it was better when you were there. But there are some questions, and I think one of the factors that has not been brought out yet is the breaking of the confidentiality of the ABA reports to those at the White House who are interested in this nomination, and then sharing those problems with the nominee, which in turn caused him to go out and do some lobbying.

But let me first ask you, about how many circuit court of appeals judges came before you while you were holding your responsibilities at the Department of Justice?

Mr. **Schmults**. Senator Metzenbaum, I do not really have that number, but——

Senator **Metzenbaum**. Just a guesstimate.

Mr. **Schmults**. I suspect 20.

Senator **Metzenbaum**. Twenty?

Mr. **Schmults**. Twenty, twenty-five, somewhere in there.

Senator **Metzenbaum**. And were the Senators who were in those regions—did many of those circuit court of appeals nominations come about as a result of suggestions made by Senators in those 20 different instances?

Mr. **Schmults**. Yes, sir, in some cases, that is certainly true.

Senator **Metzenbaum**. But in this instance, neither Senator Warner nor Senator Trible made a recommendation to you or had the name of Mr. Wilkinson on their list. Senator Warner gave you a list; Senator Trible did not—is that correct?

Mr. **Schmults**. Senator, as a preliminary matter, let me state that it was the position of the President that with respect to district court judges, the recommendations of the Senators were given great weight, as we all know. With respect to the circuit courts, where the circuit courts obviously, as we all know, span more than one State, and encompass several States, with respect to nominations for vacancies to those courts, that this was truly, in the constitutional sense, the President's prerogative. But it is also true that in some cases, we took recommendations from Senators and in other cases, we took recommendations from other sources; in some cases, they were recommendations that emanated from within the White House or the Department of Justice. They came from a variety of sources, that is correct. And what you have said about Senators Warner and Trible is in accord with my recollection.

Senator METZENBAUM. Now, Mr. Schmults, when did you learn that Mr. Wilkinson was in trouble with the ABA committee, and that the report might not be favorable?

Mr. SCHMULTS. Senator Metzenbaum, I cannot place that date. It was sometime before the committee, obviously, acted on Mr. Wilkinson and sent its evaluation to the Senate. To the best of my recollection, it was approximately a week before the committee anticipated that it would vote on Mr. Wilkinson. I would disagree that I heard he was "in trouble." I had understood that on the basis of the information the committee had to date, there was a possibility that it might act in an unfavorable way.

Senator METZENBAUM. And did you then share that information with Mr. Wilkinson?

Mr. SCHMULTS. Yes.

Senator METZENBAUM. And is it a fact that you, in a sense——

Mr. SCHMULTS. Incidentally, let me add to that, that was not unique. There were other candidates where we also anticipated, for one reason or another, that the committee might act unfavorably. Indeed, I mentioned in my preliminary statement that there was one meeting in my conference room regarding another candidate, where it was clear that the committee was going to act unfavorably, and where they afforded the candidate the chance to rebut the allegations point by point as a matter of fairness, a very good process.

Senator METZENBAUM. But this was an unusual situation, such that you received and Mr. Rose received a letter from the American Bar Association dated November 22, 1983, in which they say:

> Several members of our committee have become quite disturbed over what they feel has been a breach of confidentiality arising out of the Wilkinson appointment. In accordance with their suggestions, I propose to make this a subject of discussion at our midyear meeting in Las Vegas.
>
> When we were discussing Mr. Wilkinson, you will recall that I advised you that I believed any personal calls made on his behalf at or about the time a vote was being taken would be considered in bad taste and therefore quite counterproductive. Independent responses, both oral and written, from a number of committee members have indicated that my estimate was accurate.
>
> I understand the pressure * * *.

And then it goes on.

Mr. Chairman, I ask unanimous consent that the letter be included in the record.

The CHAIRMAN. Without objection, it will be included in the record.

Senator **Metzenbaum**. As a consequence of that letter, which was dated November 22, 1983, you responded to Mr. Buesser in a letter dated December 22, 1983, and in that letter you said, "To the extent that any confidential information about the status of your committee's investigation was shared with Mr. Wilkinson, we sincerely apologize and will make every effort to assure that such a situation does not occur in the future."

Is that correct?

Mr. **Schmults**. That is correct.

Senator **Metzenbaum**. Mr. Chairman, I ask that that letter be included in the record.

The **Chairman**. Without objection, it will be included.

[Material submitted for the record follows:]

American Bar Association,
November 22, 1983.

Hon. Edward C. Schmults,
Deputy Attorney General, U.S. Department of Justice, Washington, DC.

Hon. Jonathan C. Rose,
Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, Washington, DC.

Dear Ed and Jon: Several members of our committee have been quite disturbed over what they feel has been a breach of confidentiality arising out of the Wilkinson appointment. In accordance with their suggestions I propose to make this a subject of discussion at our mid-year meeting in Las Vegas.

When we were discussing Mr. Wilkinson you will recall that I advised you that I believed any personal calls made on his behalf at or about the time a vote was being taken would be considered in bad taste and, therefore, quite counter-productive. Independent responses, both oral and written, from a number of Committee members have indicated that my estimate was accurate.

I understand the pressures under which the Justice Department was operating but I do want to make sure that there is not a repetition of this breach of security whereby numerous people knew specific details of confidential information shared with you which were obviously conveyed to the candidate.

It is not too early to invite you both to the mid-year meeting of our Committee which will be in Las Vegas on Saturday February 11, 1984. As usual there will be a dinner and cocktail party on Friday evening, February 10, which we would hope both you and your wives will be able to attend. The business meeting of the Committee is scheduled for Saturday commencing at 9:30 a.m. I would like very much to have Dennis Mullins attend the dinner and Committee meeting. He has been my principal contact with the Justice Department and I have a high regard for his perception and understanding. I should like him to meet the other members of the Committee and for them to meet him.

All of you will get more formal letters of invitation in early January but I advise you now so that may do some long-range planning.

With best personal regards, I am

Sincerely,

Frederick G. Buesser, Jr., *Chairman.*

Enclosures.

U.S. Department of Justice,
Office of the Deputy Attorney General,
Washington, DC, December 22, 1983.

Frederick G. Buesser, Jr., Esq.,
Chairman, Standing Committee on Federal Judiciary, American Bar Association, Buesser, Buesser, Snyder & Blank, Bloomfield Hills, MI.

Dear Fred: Thank you for your letter of November 22, in which you shared your concerns regarding the confidentiality of communications with your Committee.

We agree that it is very important that the confidentiality of the judicial selection and evaluation process be maintained. From the Department's standpoint, it is helpful that any of your Committtee's concerns or doubts about a candidate's qualifications be shared with us promptly so that we can address those questions ourselves and, if appropriate, provide your Committee with additional information.

With respect to the nomination of Mr. Wilkinson, we recognize that the pressures associated with the close of this session of Congress caused us to be very much concerned about the speed with which he would be evaluated as well as with the evaluation itself. Mr. Wilkinson had worked closely with many of us over an extended period of time and was reqarded as a member of our Justice Department team. While we are always concerned that our judicial candidates be fairly investigated and evaluated, this concern was magnified and personalized in this case. To the extent that any confidential information about the status of your Committee's investigation was shared with Mr. Wilkinson, we sincerely apologize and will make every effort to assure that such a situation does not occur in the future.

Your Committee's evaluations of the qualifications of judicial candidates are highly valued by the Department and are given great weight by the Senate and the public at large. Though we understand your concern that "lobbying" of individual members of the Committee can be counterproductive, we wanted to be sure that the Committee had a complete picture of Mr. Wilkinson's abilities and experience. We felt that his qualifications could be best conveyed to the Committee members directly by those who have had substantial personal and professional experience with him. Since we believe that your Committee wishes to acquire as much relevant information as possible about judicial candidates, we assume that persons who are uniquely able to evaluate a candidate's qualifications should not be discouraged from directly contacting Committee members. We hope that in Mr. Wilkinson's case, contacts with Committee members added to their understanding of this candidate.

We will certainly be pleased to discuss this with you at the mid-year meeting of the ABA in Las Vegas. I look forward to seeing you at that time and will be pleased to attend the Committee's dinner and meeting. We particularly appreciate your invitation to Dennis Mullins and will include him in our group.

Sincerely,

EDWARD C. SCHMULTS,
Deputy Attorney General.

Senator METZENBAUM. Now, who told you, or how did you learn that the Wilkinson nomination was in some trouble?

Mr. SCHMULTS. There were, as I indicated, constant phone calls, communications back and forth, between the ABA committee and the Department of Justice, principally between the chairperson of the committee and Mr. Rose. It is my recollection that Mr. Rose informed me that he had heard from the chairperson of the committee——

Senator METZENBAUM. What was his name?

Mr. SCHMULTS [continuing]. Fred Buesser, who is here today—that he had heard from Mr. Buesser that there was a chance that the committee would not act favorably on Mr. Wilkinson.

Senator METZENBAUM. So Mr. Rose told you, and he learned it from Mr. Buesser; is that it?

Mr. SCHMULTS. I believe that is correct, yes, sir. I know that I learned it from Mr. Rose.

Senator METZENBAUM. Is that correct, Mr. Rose?

Mr. ROSE. That is correct, Senator, yes.

Senator METZENBAUM. Now, this was while Mr. Howard, the initial investigator, was preparing his negative report, or was it after Mr. Howard's report was completed?

Mr. SCHMULTS. I am not sure of that in my own mind, but it was at or about the time the report was completed. I assume the report would have been completed before the committee meeting, which was to occur in a handful of days. But I do not know that it was completed or not.

Senator METZENBAUM. Did you obtain a copy of Howard's report?

Mr. SCHMULTS. I did not.

Senator METZENBAUM. Did you, Mr. Rose?

Mr. ROSE. No, Senator. This was really an ongoing process. I do not think we can define this down to a period of days that we heard that there was a possibility of a negative report being given on Mr. Wilkinson's nomination.

Senator METZENBAUM. Did you talk to anyone at the ABA about Howard's report?

Mr. ROSE. I must have talked to Mr. Buesser about it, I am sure.

Senator METZENBAUM. And did you, Mr. Schmults?

Mr. SCHMULTS. Yes; I did.

Senator METZENBAUM. To whom?

Mr. SCHMULTS. I believe I talked to one, and possibly two members of the committee. Incidentally, I did not have that report, did not know what was in the report, and indeed, the ABA was always very careful, one, not to let the Department see these reports, and, two, to maintain the confidentiality of their sources. They never revealed to us the sources of information, and at no time did we reveal that to Mr. Wilkinson, because we did not know the sources.

Senator METZENBAUM. Well, it did become known that Mr. Howard was prepared to file an unfavorable report; is that right?

Mr. SCHMULTS. That is correct.

Senator METZENBAUM. And you do not know how you learned that?

Mr. SCHMULTS. Yes; I have indicated how I learned it—from Mr. Rose.

Senator METZENBAUM. From Mr. Rose. And how did you learn that, Mr. Rose?

Mr. ROSE. Well, I recall that Mr. Buesser indicated that the report was likely to be negative.

Senator METZENBAUM. And then was a Mr. John Lane appointed by the ABA committee as an additional member, or to do a separate report? What were the facts?

Mr. ROSE. Well, I do not think the situation can be characterized as "then there was somebody else appointed." I think the way this process worked—it is often very much a back-and-forth set of communications between the ABA committee and the Department with the restrictions that Ed has already indicated. We are very rarely, if ever, told the precise sources of information for the ABA, because one of the reasons the ABA gets information sometimes that we do not, is that they are able to make a pledge of confidentiality that we cannot, at the Justice Department. Essentially, we were told that this was turning out to be a lengthy investigation. Quite often in the course of lengthy investigations, someone else is appointed to assist a principal member, because this is all done on volunteer time. I think at some point, Mr. Buesser informed me that he thought he would appoint someone else to assist Mr. Howard in the investigation. I think that was how it was stated to me.

Senator METZENBAUM. At that time, had Justice Powell intervened in connection with the matter?

Mr. ROSE. I am not aware that he had, no. I would doubt that he had, but I do not know that, Senator.

Senator METZENBAUM. Let me ask you, when did you learn—Mr. Chairman, I understand my time is up, but I would hope that I would have additional time, in the event that Senator Specter or Senator Kennedy or some other member of the committee fails to cover certain subjects.

The CHAIRMAN. Yes; we will come back to you.

Senator METZENBAUM. Thank you.

The CHAIRMAN. The distinguished Senator from Pennsylvania has in addition to his own 10 minutes, the balance of the time from Senator Mathias.

Senator SPECTER. Thank you, Mr. Chairman.

I would extend my personal greetings to both Mr. Schmults and Mr. Rose, and associate myself with the remarks of Senator Biden, that Mr. Schmults did outstanding work while in the Department of Justice. I will comment also that I appreciated working with Mr. Rose, and I thank both of you gentlemen for coming back here today.

Mr. SCHMULTS. Thank you, Senator.

Mr. ROSE. Thank you, Senator.

Senator SPECTER. Mr. Rose, let me begin with you. There is a report published in the Washington Post dated May 27, 1984, which states: "Former Assistant Attorney General Jonathan Rose, one of the two senior Justice officials who, foes charged, helped in the lobbying for Wilkinson last week says he did not recall doing so."

Is that an accurate quotation, Mr. Rose?

Mr. ROSE. I did not regard my activity here as out of the ordinary of what we do in the course of normal nominations. So this whole idea of characterizing this as lobbying has been a bit new to me, frankly, Senator.

Senator SPECTER. So you were accurately quoted as denying lobbying——

Mr. ROSE. Yes.

Senator SPECTER [continuing]. But did not think that it was lobbying?

Mr. ROSE. No. We share information with the committee on a routine basis. This happened to be somewhat unusual only in the sense that the committee's chairmanship had just changed; there were a number of new members of the committee who may have not been as familiar with our procedures as some of the former members of the committee. But I did not view it as lobbying, no.

Senator SPECTER. But you did make contacts——

Mr. ROSE. Oh, yes. We frequently had contacts with the committee and did not regard them as improper at all.

Senator SPECTER. What members of the ABA committee, then, if any, did you contact?

Mr. ROSE. Well, my most frequent contact has always been the chairman. I may well have talked with other members of the committee, such as Mr. Van Dusen from Pennsylvania, Mr. Fiske. I have no specific memory of talking to other members of the committee on this particular nomination, but I may well have, and I certainly would not have regarded it as improper.

Senator SPECTER. Did you maintain any records, memoranda, files, on people you talked to, as well?

Mr. ROSE. Not typically, and I do not recall maintaining any in this case, no.

Senator SPECTER. Typically, when you had a telephone conversation with someone in your official capacity, you did not maintain any memoranda or handwritten notes?

Mr. ROSE. Not typically, unless there were some specific reason to have one.

Senator SPECTER. On a letter which we have just received from Mr. Buesser dated August 6, 1984, on page 5, Mr. Buesser says, "I was advised of telephone contacts made to the following committee members, to the best of my present recollection: Messrs. Hewitt, Harrington, Keane, Fiske, Dunnings, Lafitte, Gavin, and Pfeiffer."

Now, did you contact Hewitt, Mr. Rose?

Mr. ROSE. I do not recall doing so, no, sir.

Senator SPECTER. Might you have?

Mr. ROSE. Conceivably, but I doubt it.

Senator SPECTER. Did you contact Mr. Harrington?

Mr. ROSE. That is conceivable, but I doubt it as well.

Senator SPECTER. Did you contact Mr. Keane?

Mr. ROSE. I do not believe so.

Senator SPECTER. Is it conceivable?

Mr. ROSE. It is—it has been a while ago.

Senator SPECTER. Mr. Fiske?

Mr. ROSE. I have talked with Mr. Fiske a number of times on a number of different nominations. I do not recall talking to him specifically on this one, but I might have.

Senator SPECTER. Mr. Dunnings?

Mr. ROSE. I doubt it.

Senator SPECTER. Conceivable?

Mr. ROSE. Possible, but I doubt it.

Senator SPECTER. Mr. Lafitte?

Mr. ROSE. Possible again, but I doubt it.

Senator SPECTER. Mr. Gavin?

Mr. ROSE. Possible again, but I doubt that, too. Mainly, I talked to the chairman in these situations.

Senator SPECTER. Mr. Pfeiffer?

Mr. ROSE. I do not recall that at all, no.

Senator SPECTER. Conceivable?

Mr. ROSE. The name is not really familiar. I think he is one of the newer people on the committee. So the answer is no.

Senator SPECTER. Well, Mr. Schmults has testified that he talked to one or two, as he said, but the principal line was left to you. Was there anybody else from the Department of Justice who was talking to these people?

Mr. ROSE. I have no specific knowledge of other people from the Department talking to these people, no, I really do not. They could have.

Senator SPECTER. But to the extent that contacts were made by the Department, it was within your responsibility?

Mr. ROSE. It would have been, normally. This was a subject that was discussed with others; others could have called. I am not in a position to know what everybody at the Department did, but I would doubt very much that there were many calls made from the Department other than by us.

Senator SPECTER. Mr. Schmults, you testified that you talked to one or two, but I do not believe you were then asked the followup question as to who they were.

Mr. SCHMULTS. I think I can, if I may, Senator Specter, perhaps shortcut your questioning a little bit. I have a recollection that I may have talked to Mr. Fiske, and I may have talked to Mr. Van Dusen, and I talked to no other member of the committee about this during that period, other than the chairman. I had a phone call with him about it somewhere along the way. And those happened to be two committee members whom I knew well, and I thought perhaps would value my long experience with Mr. Wilkinson and be able to evaluate the information that I desired to give to them.

Senator SPECTER. So you are sure you did not talk to Messrs. Hewitt, Harrington, Keane, Dunnings, Lafitte, Gavin, or Pfeiffer?

Mr. SCHMULTS. Yes. I am as sure of that as I can be.

Senator SPECTER. Mr. Schmults, when you talk about tough litigators, and say that you are confident that your contact would not have any effect on their ultimate judgment, you are on a point that you and I, I think, agree involves a great deal of subtlety.

Are you in a position—for example, just to pick out Mr. Van Dusen and Mr. Fiske, men whom you say you did talk to—are you in a position to give this committee assurance that neither Mr. Van Dusen nor Mr. Fiske had any important matter pending before the Department of Justice where they were representing private clients on matters of great substance, where it might have come before you for an official decision?

Mr. SCHMULTS. Yes. Let me say that I was certainly not aware at the time of any such matter; I am not aware now of any such matter. They both are partners of major and very important law firms. I suspect that at some point their law firms during this time might have had some matters where the Government was involved in one way or another. That would also be true of all of the members of the committee. I must say that I do know these people well; I have had experience in trying to persuade them of something that I felt strongly about, and I have lots of examples where I was unsuccessful. They are——

Senator SPECTER. Have you had experience where they have tried to persuade you of something that they felt strongly about?

Mr. SCHMULTS. You bet, and they have been successful. I mentioned one in my testimony, where they advised us on the basis of long questioning of a prospective candidate that that candidate was not competent to be a Federal district court judge, and I listened to that for an hour and a half on a Saturday morning, and I said I agreed with them, and we would not submit the nomination to the Senate, and we did not. So this is necessarily a free and frank exchange among people of integrity and character and who are not going to be influenced and lobbied in that sense.

And I do not believe Justice Powell intervened in the sense that Senator Metzenbaum uses it. Justice Powell had relevant information. And I would hope that this committee—and I know that it was true at the Department of Justice—would hope that the ABA committee would get all of the information that it could get that was important in weighing a candidate. These are difficult questions. We are talking about people's characters and careers and lives. And the more information that the ABA committee had, the more confident that I was that they would arrive at a wise decision. And I believe that they did so in the case of the Wilkinson nomination.

Senator SPECTER. Mr. Schmults, with regard to your comment about the ABA committee getting the relevant information, I note that the ABA committee through Mr. Howard and Mr. Lane made specific inquiries to Justice Powell.

Mr. SCHMULTS. Yes.

Senator SPECTER. So, in the context of wanting to be sure that the committee had before it what Justice Powell knew, wasn't that sufficient? We cannot speak for Justice Powell; he has chosen not to be here. We have already commented on that extensively, so we are in a sense speculating. But you brought up Justice Powell just now, and you commented earlier, and I think accurately so, when you testified that a call from a Supreme Court Justice would be an important call. Well, Supreme Court Justice Powell had been contacted by the ABA. It was not like you who, as you say, had not been contacted. Two men, Mr. Howard and Mr. Lane, had contacted Justice Powell.

Mr. SCHMULTS. Excuse me. I am not sure when Justice Powell was contacted. I am not sure whether he was contacted in the first round of the investigation, if you will, by the ABA. I do not know that for a fact.

Senator SPECTER. Well, we have a letter from Justice Powell dated March 12, and he says that, "Mr. James Howard, a committee member from my home State, called me last summer"—a letter dated March 12, 1984—and asked my opinion as to the qualifications of J. Harvie Wilkinson III who clerked for me here. I responded favorably, noting the difference in the qualifications appropriate for a district court judge and those for a circuit court judge. Mr. Lane, the committee member for DC called me later—in November, I believe. As I recall, he stated he was calling me as a Virginian, and because of the negative report from Mr. Howard."

So, Mr. Howard would be on the first round. And then Justice Powell said, "I was concerned by what Mr. Lane had said about the report from my State. This prompted me to call Gene W. Lafitte of New Orleans, on my own initiative."

Now, Justice Powell is not here, and perhaps you are not the best witness, obviously. But you mention him, you say it was an important call. I think it is an important call. What justification is there, once the ABA has made two calls to Justice Powell, to have Justice Powell make that call on his own initiative?

I mean, you obviously do not know if Mr. Lafitte has a matter pending in the Supreme Court of the United States, do you?

Mr. SCHMULTS. No; I do not. Well, Senator Specter——

Senator SPECTER. Do you think Justice Powell's call to Mr. Lafitte was an appropriate call in the context where two men had already called him from the ABA, and the ABA had his views?

Mr. SCHMULTS. Yes; I think it was an appropriate call. When I said that I thought it was an important call, I meant that all calls from people or all information from people who had close association with Mr. Wilkinson and who had relevant information about his professional competence and background, calls from any of those people, not because one happens to be a Supreme Court Justice, would be important calls.

I think that is really an essential point here, Senator Specter, and that is—I am just repeating myself—and I apologize for that—it seemed to us at the Department, and it seems to me now, that it is important that the committee, indeed this committee when it is evaluating a judicial candidate, have all relevant information.

Senator SPECTER. Do you think Mr. Buesser was wrong when he in effect admonished you two gentlemen for making the calls in an inappropriate way, in what he called a counterproductive way?

Mr. SCHMULTS. Well, let me say I do not think Mr. Buesser was wrong. I do not agree with his admonishment, if you want to use that term, and I am not sure it is an admonishment. He expressed a concern about the timing of the additional information flowing to committee members. We certainly come at this from somewhat different perspectives.

We, as a part of the administration, were anxious that his committee have all information before it arrived at its evaluation. Obviously, as I look back on this process, it would have been more desirable—and I think this was in Mr. Buesser's mind—it would have been more desirable had that information come to the committee earlier and in a more orderly way. It did not. We felt it was important that the committee get the information, and as I said in my testimony, knowing these members, I have no doubt that they were not unduly influenced by information. But I would like to think that persuasive information that goes to Mr. Wilkinson's competence did carry weight with the committee. Indeed, it should.

Senator SPECTER. Mr. Schmults, this is a very important matter, and I repeat, I have great respect for your viewpoint on the matter. In assessing what calls are or are not important—and I think this hearing is likely to set a standard for what calls are or are not appropriate, and you have defended Justice Powell's calls and you have defended your own calls—but the question is really in the context of what Mr. Buesser has said and what you said contemporaneously at that time. He wrote to you on November 22, 1983:

> Several members of our Committee have been quite disturbed over what they feel has been a breach of confidentiality arising out of the Wilkinson appointment.

And it goes on:

> When we were discussing Mr. Wilkinson, you will recall that I advised you that I believed any personal calls made on his behalf at or about the time a vote was being taken would be considered in bad taste and therefore quite counter-productive. Independent responses, both oral and written, from a number of Committee members have indicated that my estimate was accurate.

Now, is it the timing of the calls, or do you just totally disagree with Mr. Buesser and feel that Mr. Buesser is wrong in what he is saying, and that the calls which you and Mr. Rose and Justice Powell made were appropriate?

The CHAIRMAN. Senator, your time is up, but we will let him answer the question.

Senator SPECTER. Is my full 20 minutes up, Mr. Chairman?

The CHAIRMAN. Well, Senator Mathias took some time.

Mr. SCHMULTS. Senator, I believe that we are now—and we can do this, and I am happy to be a part of this—putting a microscope, if you will, on a part of a very complex and untidy process, and that is the work of the ABA committee in contacting judges and lawyers and other people who have information about candidates, some of whom are not willing to speak candidly for fear the person will become a judge. So this is not a neat, orderly process that we can wrap up in a nice fashion.

I agree with Mr. Buesser in one respect, and that is that I regret that calls had to be made to the committee on the eve of their voting. But I do not regret doing so, because I think it is important in this untidy process that when all is said and done, and you look back on it, that those people with important information who know Mr. Wilkinson have conveyed that information to the committee in an effective way. I believe that we ought to do that.

Now, it seems to me that we have to keep that in mind. I think if you look at the end result here, it was a fair process. I do not believe the committee was unduly influenced or lobbied. Indeed, I have always thought that lobbyists serve a very valuable function to the Congress and to other people, by providing accurate information and facts to all of us in our busy days, that we do not have time to collect. I think that is also true of this committee. So I do not regret at all that we provided information to the committee.

I do wish, looking back at it, it had been done in a more orderly way. But I have participated in so many of these selection processes and been aware of the way in which the ABA conducts them and the way we conduct them ourselves in the Justice Department, to know that if you put a microscope on any one of them, you will find ways that you wish it had been done somewhat differently.

Senator SPECTER. Mr. Chairman, may I just ask one more question? I ask unanimous consent——

The CHAIRMAN. You do not have to ask it. I will grant it. Just get through as soon as you can, because your time is up.

Senator SPECTER. Thank you, Mr. Chairman.

This is the central point, and I do have one final question, Mr. Schmults, and it is this. In trying to define the parameters of when it is appropriate to make calls, and where you are dealing with men on a committee in firms which have constant business before the Department of Justice, and have constant business before the Supreme Court of the United States—and we are talking about great subtleties of interrelationships—a request to a Deputy Attorney General, or arguments before a Supreme Court Justice, don't you think that at least you pass the point of no return when the ABA members state that they are disturbed at that final stage in the process, and they do not want to be called?

Isn't there some point beyond which Department of Justice high-ranking officials should not be calling the ABA?

Mr. SCHMULTS. Well, as far as I know, I do not believe we arrived at that point in this process. I think it was our conveying information to the committee that raised the concerns that were then raised in Mr. Buesser's letter, but that was after the process had run.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Now, I would like to ask the Senators not to duplicate. For instance, if one Senator has brought out points, there is no use going over them again. We are wasting time, and we have a lot of busy people here, and we have a long list of witnesses. So I would just suggest to the distinguished members of the committee that if you can avoid duplicating, we will appreciate it.

Our next Senator to question the witnesses is the able Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman. I want to express my deep respect for Mr. Schmults and Mr. Rose, having worked with them at the Justice Department.

Mr. Schmults, can you give us a quick summary of the selection process in the Justice Department? Besides the FBI record and the ABA recommendation, what are the primary ingredients of that decision process before you submit the name to the White House or up to the Senate?

Mr. SCHMULTS. Senator DeConcini, a prospective candidate or a prospective nominee may be recommended by a U.S. Senator or by someone else. At the Department, if that candidate looked attractive in the sense that he or she would be a person that would make a fine judge, we would make a very preliminary cut at whether we thought the person recommended would have the necessary qualifications to be a judge.

That might involve a few calls into the community; reading some opinions, if we were talking about a Federal district court judge. There were a variety of ways that we made what we called a threshold determination that we were dealing with someone who would be a very good district court judge.

Preliminary work was done in Jon Rose's office, and a memorandum was prepared in most cases that would then be considered by the Attorney General at a weekly meeting, which I attended, Mr. Rose attended, the Attorney General, and one or two others.

Then the Attorney General's recommendation would be sent to the White House, and there was a weekly meeting of a judicial selection group at the White House, made up of Mr. Baker, Mr. Meese, Mr. Fielding, myself, Mr. Rose, Mr. Guiliani, and others.

That group would review the Attorney General's recommendation and the other recommendations that it might have for the particular vacancy. Again, another threshold determination was made that this looked to be a promising candidate, and then that name was given to the FBI for a background investigation, and was given to the ABA for its evaluation.

Then that process that would run sometimes——

Senator DECONCINI. Excuse me, Mr. Schmults. Was it given to anybody else besides those——

Mr. SCHMULTS. Well, for example, if there was a U.S. Senator involved, the Senator would be informed that there had been a preliminary consensus and we were moving forward with that name.

Senator DECONCINI. Excuse me. Rating the significance of the FBI background information that would come back to you on a scale of 1 to 10, where would you rate that? Is it significant?

Mr. SCHMULTS. If I could come back to that in just a second because I am not quite through yet——

Senator DECONCINI. OK, I am sorry. I thought you were through.

Mr. SCHMULTS. In that process, the FBI and the ABA would take anywhere from 4 to 5 weeks, sometimes more—8 weeks, I guess, in some cases, and more. Then we would get reports from the ABA and from the FBI, and again there would be a White House meeting.

We would then have all of the information and there would be a final recommendation made to the President, and if he elected to move forward, then the nomination was made.

Now, your question, on a scale of 0 to 10, on what the FBI——

Senator DECONCINI. On the FBI report.

Mr. SCHMULTS. Well, both those reports—the ABA report, because of its great expertise in evaluating and ability to talk to large numbers of people about the person's legal competence, was valued extremely highly by the Department, as was the FBI background investigation.

Senator DECONCINI. I have seen sanitized versions of the FBI report with the names deleted from them.

Mr. SCHMULTS. Yes; so far as the FBI report.

Senator DECONCINI. Do you look at those reports or did you just take a recommendation that you got?

Mr. SCHMULTS. Oh, no. Those reports——

Senator DECONCINI. Were reviewed?

Mr. SCHMULTS. Were reviewed by people in Mr. Rose's office; yes, sir.

Senator DECONCINI. And then what about the ABA? On what scale would you rate its recommendations to you?

Mr. SCHMULTS. Well, it was very important. I do not know; I am not going to put a number on it, but obviously——

Senator DECONCINI. While you were in the Justice Department, do you know of any recommendations that were sent up for consideration by the Senate that did not have the ABA recommendation?

Mr. SCHMULTS. Yes.

Senator DECONCINI. You did?

Mr. SCHMULTS. Yes.

Senator DECONCINI. How many would you say?

Mr. SCHMULTS. It was very few in number. One, two?

Mr. ROSE. One, I think.

Mr. SCHMULTS. I think one.

Senator DECONCINI. And do you recall why that was? Does it come to your mind, that case?

Mr. SCHMULTS. Yes; that case comes very clearly to my mind.

Senator DECONCINI. Which case was that?

Mr. SCHMULTS. That was the case of Sherman Unger, who is now deceased.

Senator DECONCINI. Unger; fine, thank you.

Now, going back to the ABA recommendation, when you submit a name to the ABA, you have no standards, I presume, within the Justice Department—and please correct me—that you are restricted from making calls to anybody in the ABA or anyone else. You go ahead with your own investigation; is that correct?

Mr. SCHMULTS. I think investigation would be too strong a word for it. It is basically a threshold cut at whether we had a candidate that we ought to move the process along to the next stage. We do not really investigate, as such.

Senator DECONCINI. My point is that you do not shut down; you continue to take information and, for that matter, if you feel obligated to call somebody, you would call them, whether he or she is part of the ABA committee or a lawyer or a relative or some judge you might know in the district or something. Is that correct?

Mr. SCHMULTS. Absolutely; yes, sir.

Senator DECONCINI. And is that a frequent thing that you would continue to do?

Mr. SCHMULTS. Frequent, I do not know, but certainly it happened a good many times.

Senator DECONCINI. Now, when you get the word back, as you did from Mr. Rose, apparently, that this nomination was in trouble—is that an accurate description of the report you got back?

Mr. SCHMULTS. I suppose that is accurate; yes. I will accept that.

Senator DECONCINI. Did you interpret that as meaning that the ABA was likely to recommend that Mr. Wilkinson was not qualified?

Mr. SCHMULTS. I do not know about "likely," but certainly that there was more than a remote chance; yes, Senator.

Senator DECONCINI. Now, when that happened, what did you do? Did you ask the ABA to reconsider or to appoint a second investigator, or what did you do? Or did Mr. Rose——

Mr. SCHMULTS. Well, let me say this has happened in other cases. When we became aware of that, there were times when we would ask the ABA to conduct a supplementary investigation, perhaps using another member of the committee to conduct it. Or we would provide additional names to the ABA that we thought had information that might cause the preliminary evaluation to be changed.

In this case, quite frankly, I am not sure if we specifically asked for a second review or whether that was already underway. Mr. Rose may know the answer to that, but I do not.

Senator DECONCINI. Mr. Rose, can you——

Mr. ROSE. No, I do not recall our asking for a second review. I think it was just concluded that this was sufficiently complicated case that it merited a second——

Senator DECONCINI. Concluded by who, the ABA?

Mr. ROSE. The ABA, and that was not infrequent; that was done on a number of investigations while I was in the job.

Senator DECONCINI. Why would they do that, in your judgment? If they were coming forward with a report that was not going to be favorable, why would they, on their own, initiate a new——

Mr. ROSE. I think the ABA committee has as much of a desire as any group, and that group, in particular, to be fair to a nominee and to make sure that they have uncovered all of the facts and background relevant to a particular nomination.

Either there can be a series of complex fact situations that are too much for one person to undertake, or there can be people that have not been interviewed or different perspectives. There can be a variety of reasons why somebody else is appointed to assist with an investigation.

Senator DECONCINI. Mr. Schmults, in your Saturday discussions or one to one on telephone discussions, when the ABA gave you information that was, in your opinion, confidential, did they disclose their sources to you?

Mr. SCHMULTS. No; they did not.

Senator DECONCINI. They did not?

Mr. SCHMULTS. They did not.

Senator DECONCINI. Did it ever trouble you when the ABA gave a recommendation that was not what you would have liked or had hoped. Did you have doubts as to the credibility of the ABA and what their sources were?

Mr. SCHMULTS. Well, obviously, I was troubled by that if I disagreed with their evaluation, but I respected and indeed think it is absolutely essential that the ABA committee is able to protect their sources.

They are not a Government agency. They are doing this out of service to the bar and to the public. Indeed, it had been our experience that they frequently get, as I mentioned, more candid evaluations; people feel freer to speak to the ABA than they do to the Department or the FBI.

I had a predecessor in my job as Deputy Attorney General who told me after he left the office, he asked for his FBI background investigation. It was sanitized, as you said, and he was able, even though they took out the names, to identify the names of every person that the Bureau had talked to.

Now, that is known to people, and it really cuts down the quality and the accuracy of information. This is a real problem we are dealing with.

Senator DECONCINI. Well, that may be true, Mr. Schmults, but also does it not lay the groundwork for some unjustified accusation by someone?

Mr. SCHMULTS. Yes, it does, and that is why I think the ABA takes care, in cases where they are not certain, to have a second investigation.

Senator DECONCINI. Mr. Chairman, I will finish up with one quick question.

Mr. SCHMULTS. I am sorry, sir.

Senator DECONCINI. What would you do when you got information that was derogatory about someone? Did you just say, well, the ABA says so, so that is OK with me? Would you ask the FBI to follow up with the ABA and follow that source that was not disclosed to you.

Mr. SCHMULTS. Yes. We might well ask the FBI to check out a particular piece of information.

Senator DECONCINI. Did you do that?

Mr. SCHMULTS. Well, not in this case, no, but there are examples when we did that.

Senator DECONCINI. So the ABA was not gospel?

Mr. SCHMULTS. The ABA would not give us their source, but they would give us a fact situation that presumably came from a source and we might ask the FBI to doublecheck that. And where we found it incredible, we would ask the ABA to doublecheck it themselves and they were always willing to do so and they were extremely cooperative.

Senator DECONCINI. Mr. Chairman, thank you. I do want to say, Mr. Chairman, as far as Justice Powell making a telephone call in this matter, I as one Senator do not find that objectionable.

I think Supreme Court Justices or Senators or anyone who knows a nominee certainly has the right to make calls.

Mr. SCHMULTS. I agree with that.

Senator DECONCINI. It is up to the person that they call, in my judgment, as to how influenced they would be. I have been called by Supreme Court Justices and sometimes have been influenced and sometimes have not been. I would hope that members of the ABA or Senators or Justice Department people would take those calls for what they are meant to be and that is to pass on a professional recommendation.

Thank you.

The CHAIRMAN. Thank you, Senator.

Our next member to question is the distinguished Senator from North Carolina, Mr. East.

Senator EAST. Thank you, Mr. Chairman. I would like briefly to say, that I have not dealt with Mr. Rose that much, and I do not mean to neglect him. But there has been great praise here for Mr. Schmults, and I would like to add to that. I had the pleasure as a young man, some years ago, of going through officer candidate school with him in the Marine Corps. So we have known each other for a long time.

So I simply wish to add to the record here my great admiration for Ed Schmults, and I regret that he is no longer with the Department of Justice. That aside, back to the business at hand.

I think, Mr. Chairman, that the testimony here has been very useful. I agree with the chairman that we do not need to repeat old ground. But it seems to center increasingly upon the process by which the ABA evaluates and decides whether people are qualified or unqualified.

Now, I think that Mr. Schmults has put his finger on it. This is not a sequestered jury, this ABA committee. As Mr. Buesser notes in his letter, you are dependent upon the integrity of the members of the committee.

And there is a very loose-ended flow of information back and forth, which is understandable. Now, as regards the question of Justice Powell calling Mr. Lafitte, I think Justice Powell in his letter of March 12 answers that more than adequately.

He said, first, he was called by Mr. Howard James, a committee member from his State. Then he says he was called by Mr. Lane, a committee member for DC, and he was somewhat concerned that maybe his opinion was not well understood by members of the committee, so he proceeded to call Mr. Lafitte. I think it is purely appropriate; again, there is this flow of information, and this is not a sequestered jury.

And ultimately you are dependent upon the integrity of the committee. Mr. Buesser closes his letter of May 18 by saying, "The integrity of the process depends upon the integrity of each committee member, and I am proud to be associated with 13 people of great character." So I think that answers our question as regards Mr. Lafitte.

Now, as Mr. Schmults says, he called. Well, I do not think anybody is impugning the integrity of Mr. Schmults, nor is anyone impugning the integrity of any member of this committee, 13 people of great character. It simply is a part of the flow of information.

Now, I do not know how else the committee is to function, candidly. You are going to have to look at the integrity of the people involved. Now, if we feel that their particular process is a little bit too loose-ended and they should work it more like a sequestered jury, we might ultimately make that recommendation to them. I do not know that it has anything to do with Mr. Wilkinson's nomination.

But on the other hand, I think that since we do ask for their opinion—we are not bound by it, we are not required to do it by law or under the Constitution—we are simply dependent upon the integrity of their process, which I think is a perfectly understandable and normal one under the circumstances.

And this implication of lobbying, which is kind of a buzz word, or "undue influence," which is more than a buzz word, indicating somewhat unsavory context, throws this thing very much out of perspective.

Now, on this matter of first coming back, Mr. Chairman, with an "unqualified" rating from one member, as Mr. Buesser points out in his letter this is a very common occurrence, and one reason being because obviously the members of the committee are dependent upon receiving a flow of information over a period of time.

So, naturally, people of character, and integrity, and who have had experience with the nominee, be it a Mr. Schmults, be it a Justice of the U.S. Supreme Court, should and ought to feel free to call these members.

And, again, what do you come back upon? Well, you come back upon the integrity of the members of that committee. Now, if we no longer think the ABA is a responsible professional organization, or, to wit, more specifically, if we feel that their screening committee clearly is not made up of people of great character, well, then let us no longer ask for their opinions. Let us say that we do not care to have it, that we are indifferent to it.

But I do not think anyone is suggesting that. Now, again, it is the buzz words lobbying, and so forth, that trouble me here. It is a process, loose-ended, open-ended—no one is questioning that—of an interchange and flow of ideas between people who have information and knowledge.

And ultimately it is the full integrity of the committee that you are dependent upon, and its members, and they, by "a substantial majority," found the candidate qualified. And I do not see how personally a Senator, in good conscience, on this narrow dimension of the nominee—and whether we ought to move on through an orderly process of confirmation—can be troubled; I am certainly not.

And what has troubled me is the point that I made earlier, and with which I think Mr. Schmults agrees, that this kind of thing is going to make it more and more difficult for us to get highly qualified people like Mr. Wilkinson to submit to running this public gauntlet because the implication is some sort of unsavory conduct of lobbying and trying to overturn unqualified decisions.

If you look with care and objectivity upon the process by which the ABA does this screening, I do not think any of that is in there, and I think that the process stands fully exonerated. And certainly Mr. Wilkinson personally is not in the least bit tainted by it.

I regret, Mr. Chairman, that I might be taking time to restate points that have already been made in a more specific, factual way, but I simply wanted to summarize my own sentiments that I see nothing objectionable here and I see no one questioning the integrity of the ABA committee or questioning the integrity of a Mr. Schmults or questioning the integrity of a Justice of the U.S. Supreme Court.

So, wherein lies the problem? I see no problem, unless you say that we would recommend in the future that the ABA select a committee, sequester them, and then have witnesses summoned and confined, like any jury, only to making their determination based exclusively and solely upon what they hear from that jury of witnesses. But I do not think that anyone is seriously going to propose that the ABA do that. And I think that if we did, the ABA would say: "Gentlemen, why do you not set up your own committees and we will bow out of this because it is simply an impossible situation for us to handle in that form? If you value our opinion, please rest it upon the integrity of our membership. If you do not trust the integrity of our membership and the integrity of our committee, we respectfully bow out."

I am not telling the ABA what to do. It is a highly respected professional organization. That is probably what I would recommend to them if I served on their board of directors; let the Senate Judiciary Committee set up their own little investigation committee, or full "qualified/unqualified" committee.

But we have chosen to ask for the ABA's judgment. They have done their best to give it to us and I see absolutely nothing tainted about it. And again I repeat, and I end on this—I do not wish to go on ad nauseum about it—I think again I come back to the point that Mr. Schmults raises that I think a person of the quality of Mr. Wilkinson ought not to have to be subjected to this.

You are talking about an individual, you are talking about a family, you are talking about colleagues, you are talking about a reputation that was impeccable. Now, all of a sudden, a little public cloud maybe has been put on it in recent weeks and months.

And I think personally, with all due respect to my colleagues on this committee and in the U.S. Senate, it reflects, candidly, more adversely on us and our confirmation process which we are constitutionally obligated to undertake, Mr. Chairman, than it does upon the nominee or the distinguished committee of the ABA that made this final determination, finding him "substantially qualified."

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir.

The distinguished Senator from Maryland, Mr. Mathias.

Senator METZENBAUM. I think it is my turn, the Democrats turn.

The CHAIRMAN. Excuse me just a minute. The distinguished Senator from Ohio, Mr. Metzenbaum.

Senator METZENBAUM. Let me just commend my colleague on my left for his good questions. I thought those were excellent questions you asked, and I want to point out to you that you may have missed the point.

We who are Members of this body have an obligation under the Constitution to advise and consent. And, understandably, in doing that in some instances it could and it oftentimes does create problems for those who are up before us for confirmation. But that does not mean that we should not accept our responsibility.

I would also like to point out to you that the issue has to do with the process, and even in the most recent letter of Mr. Buesser, he points out in this particular case it was the timing of these calls which was objectionable.

And as a matter of fact, I want to point out to you that the situation of the ABA writing a letter to the Department of Justice in connection with their violating the confidentiality of their report with Mr. Wilkinson was sufficiently chastising that Mr. Schmults—whom again I will say we all respect—but even he recognized that and saw fit to apologize to Mr. Buesser in his letter of December 23.

So that I am not also subjected to the same point of not asking questions, let me come back to the question. Mr. Schmults, I only have a few more questions. Did you have any knowledge about which members of the ABA committee, in addition to Mr. Howard, might be rendering an unfavorable assessment of Mr. Wilkinson's qualifications?

Mr. SCHMULTS. No, I do not believe I had any such knowledge.

Senator METZENBAUM. With whom else did you discuss the ABA proceedings besides Mr. Rose?

Mr. SCHMULTS. Well, as I have indicated, I discussed it with Mr. Buesser. I believe I discussed it with either Mr. Fiske or Mr. Van Dusen, or perhaps both. I really do not recall, but I know I made one call; I am just not sure at this time to which of those two members of the committee.

I discussed it with individuals at the Justice Department who were concerned with the judicial selection process.

Senator METZENBAUM. Who?

Mr. SCHMULTS. I probably would have discussed it with the Attorney General, with Tex Lazar, and people like that who are——

Senator METZENBAUM. Brad Reynolds?

Mr. SCHMULTS. I do not recall whether I did or not. I probably would have, but I do not——

Senator METZENBAUM. Did you talk with anybody at the White House?

Mr. SCHMULTS. I am sure I would have discussed it, or if I did not, John Rose would have, with Fred Fielding, who was our contact at the White House on judicial matters. And I discussed it with Justice Powell.

Senator METZENBAUM. And did you call Justice Powell?

Mr. SCHMULTS. I did call Justice Powell.

Senator METZENBAUM. And what was the substance of that conversation?

Mr. SCHMULTS. I told Justice Powell that there was a possibility that the ABA committee would not vote favorably on Mr. Wilkinson and I inquired as to whether or not he had been contacted because I was concerned that we had not been contacted at the Department of Justice, and asked him for any help that he might give, consistent with his view of what he should do as a Supreme Court Justice.

And Justice Powell said that he would have to think that over, and that was the last I heard from him on this.

Senator METZENBAUM. Do you tell him of any particular members of the committee that he might see fit to call?

Mr. SCHMULTS. No, I do not believe I did. I would not have suggested that to the Justice.

Senator METZENBAUM. And by implication, if not directly, would you say that your discussion with Justice Powell could have been interpreted as an indication to him that if he was in a position to be helpful and make any calls, that that might be a pretty good thing to do?

Mr. SCHMULTS. Certainly; that is the reason why I made the call.

Senator METZENBAUM. And did you ask that any other persons contact the ABA officials on Wilkinson's behalf?

Mr. SCHMULTS. I do not believe so, Senator Metzenbaum. I do not recall making any other calls outside the Department.

Senator METZENBAUM. Did Mr. Wilkinson have a list of the ABA committee members?

Mr. SCHMULTS. Did he have a list?

Senator METZENBAUM. Yes.

Mr. SCHMULTS. I do not know whether he did or—oh, I am sure he did; it is on the committee's letterhead, so he would have certainly had a list of the committee members. I am assuming that.

Senator METZENBAUM. Did you identify for him——

Mr. SCHMULTS. Oh, I am sorry; and I discussed it with Mr. Wilkinson, too, as well. That would be somebody else.

Senator METZENBAUM. Thank you. Did you identify for Mr. Wilkinson any of the potential negative votes?

Mr. SCHMULTS. No, because I did not know them, Senator.

Senator METZENBAUM. Did Mr. Wilkinson ask you or other Justice Department officials to contact the ABA or the members of the committee?

Mr. SCHMULTS. I do not recall whether he asked or whether we volunteered; it was essentially the same thing. It was a desire on all our parts to provide additional information to the committee that we felt would be helpful to it in its deliberations.

Senator METZENBAUM. Well, Mr. Schmults, it was a little more than information, was it not? You were calling Justice Powell not to provide information, but to in a nice way—and I want to be delicate, but realistically speaking, to see if he could not put a little pressure on.

Mr. SCHMULTS. No; that was not correct. It seemed clear to me that Jay Wilkinson had clerked for a Justice of the Supreme Court for a year-and-a-half in what is really a very close relationship.

The Justice had a unique view of Jay Wilkinson, seeing him analyze problems, reading briefs, dissecting legal issues, and coming up with recommendations. And that sort of information would be very valuable to members of the committee.

I did not regard it as anything along the line that you suggested. I regarded all of this as providing necessary information; what I regarded as relevant and desirable information to the committee.

And I had close experience with the members of this committee and I knew that they would not regard any such information as undue pressure.

Senator METZENBAUM. Who suggested you call Justice Powell?

Mr. SCHMULTS. No one suggested it.

Senator METZENBAUM. Can you give us any other instance where the Justice Department was criticized by the ABA for its lobbying activities or for its violating the confidential relationship with the nominee?

Mr. SCHMULTS. Well, I would have to look at Mr. Buesser's letter here.

Senator METZENBAUM. Which one?

Mr. SCHMULTS. The letter of November 22. They felt that there had been a breach of confidentiality. I note that my letter was very careful to say to the extent that any confidential information about the status of the committee's investigation was shared with Mr. Wilkinson, I regretted it.

It is not at all clear to me to this day that any confidential information, as such, was shared with Mr. Wilkinson that had not been shared in my own experience with other candidates, and that is that the ABA might well be coming out in an unfavorable way, and therefore it was desirable to be sure that they had more relevant information.

What was not shared with Mr. Wilkinson, because the ABA did not share it with me and in no instance can I recall did they ever share it with me, was the sources of the information or how particular committee members were going to vote.

That was highly confidential information. I did not know that and did not share it with Mr. Wilkinson.

Senator METZENBAUM. But you did respond to Mr. Buesser and you apologized for this question of sharing of information with Mr. Wilkinson.

Mr. SCHMULTS. Yes. I said to the extent that any information was shared. Obviously, I was concerned as an official of the Justice Department responsible for our relationships, with Mr. Rose, with the ABA; I certainly did not want the ABA committee to feel that we were not conducting ourselves in a way that they approved of, and so I sent this letter.

Senator METZENBAUM. But is it not a fact that—well, let me rephrase the question. How long were you with the Justice Department?

Mr. SCHMULTS. Three years.

Senator METZENBAUM. And was there any other instance in which you or the Department received a letter from the ABA criticizing the Justice Department for its conduct in connection with a particular nominee?

Mr. SCHMULTS. No, but there are oral communications to that effect with respect to various candidates from time to time.

Senator METZENBAUM. Where there was a violation of confidence or whether——

Mr. SCHMULTS. No. You said criticism.

Senator METZENBAUM. Criticism.

Mr. SCHMULTS. We felt free to criticize each other. This was a very cordial relationship. I did not regard his letter to me as an admonishment by Mr. Buesser or anything else. We felt free to speak to each other openly in a continuing effort to improve the process, and that is really what happened here.

Senator METZENBAUM. One last question. They asked you, then, to meet with them in February. They thought it was important enough that they were prepared to set up a meeting; I think it was in February, in Las Vegas.

Mr. SCHMULTS. Right.

Senator METZENBAUM. Did that meeting occur?

Mr. SCHMULTS. That was not a meeting set up for that purpose. I believe that was the normal midwinter meeting of the ABA, and I always attended those meetings. They were very valuable meetings at which we could discuss matters of mutual concern.

Happily, I left the Justice Department before that meeting occurred, and therefore was unable to attend.

Senator METZENBAUM. I have no further questions. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The distinguished Senator from Maryland, Mr. Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Professor Wilkinson has described a meeting which took place on the 4th of November, and I assume that some of your answers to Senator Metzenbaum have covered that meeting. Is that correct?

Mr. SCHMULTS. Where is that described, Senator Mathias? I do not recall.

Senator MATHIAS. He describes a meeting between yourself and Mr. Rose and himself which took place on the 4th of November.

Mr. SCHMULTS. Yes; I have not seen that reference, but there was such a meeting. I do not know that it was on the 4th, but we did meet with Mr. Wilkinson.

Senator MATHIAS. And then, according to the chronology as the committee understands it, between the 5th and the 7th of November Mr. Wilkinson contacted more than a dozen people to ask them to, in turn, communicate with members of the American Bar Association committee.

So the question arises, what was the nature of that meeting on the 4th? Did you adopt a game plan, and as a result of that game plan, were these various contacts made?

Mr. SCHMULTS. Well, I do not know that I would describe it as a game plan. My best recollection of that meeting is that—as we did with candidates from time to time when we ran into problems, we would review the situation with them. There were other examples of judicial candidates providing additional names and additional information to the committee.

I am sure we discussed at that meeting that it would be desirable to be sure that the committee did hear from a broader cross-section of those who had had close association with Mr. Wilkinson.

Senator MATHIAS. Did either of you suggest to him, call so-and-so, he will have influence on a certain member, and somebody else will be useful in calling?

Mr. SCHMULTS. I do not know that we really discussed it that way, but it was clear that there would be an effort made to provide additional information to the committee, yes, Senator.

Senator MATHIAS. And did you suggest to him that he undertake this course of action?

Mr. SCHMULTS. I do not recall whether we did that. I have a feeling that that——

Senator MATHIAS. Or was it clear that something had to be done?

Mr. SCHMULTS. Yes; I think that is it. It seemed clear what ought to be done and what was desirable, and I do not think we had to suggest anything to Mr. Wilkinson, nor do I think he had to suggest anything to us.

Senator MATHIAS. At the beginning of this administration, both of you will recall that Attorney General William French Smith communicated with Members of the Senate and suggested to them a procedure for handling judicial appointments, a procedure that was supposed to remove Senators from wheeling and dealing. That was to give a more prophylactic treatment to appointment of judges.

We would appoint judicial selection committees who would make the initial recommendations, and we would submit three to five candidates to the Attorney General. And all of this was to be conducted in a nonpolitical and deliberative manner.

How does the process that you have described for handling at least this circuit judge nomination comport with the general objectives that the Attorney General had in trying to remove the judicial selection process from politics?

Mr. SCHMULTS. Senator Mathias, what the Reagan administration did was to eliminate the judicial selection commissions for circuit court judges that had been established by President Carter.

We did not encourage Senators to have, even at the district court level, selection commissions, although we acknowledged that they might want to do so.

Senator MATHIAS. That is not my recollection, but the record is there.

Mr. SCHMULTS. Yes.

Senator MATHIAS. Our recollections can be checked.

Mr. SCHMULTS. Yes; I have a pretty clear recollection because I remember meeting with the Attorney General and Senator Thurmond and Senator Baker on this point. But you are right; we did ask for—and I think this is the central point that you were making—for three to five names from Senators.

That process, in fact, broke down. Senators wanted to submit, by and large, only one name, although some followed the three to five procedure. But I do not think it is realistic, nor was it in the Attorney General's mind, that you can remove politics from this process.

I see nothing wrong, quite frankly, nor do I think the Attorney General sees anything wrong, with politics in the process. Politics really is the way we arrive at decisions in a democracy, and to remove judicial selections from congressional politics, it seems to me, might transfer it to ABA politics or judicial selection commission politics. So you have politics wherever you are in this process.

And I know it was our view even when we were asking for three to five names that Senators know their home States very well; they know who the good judges are or who the good lawyers are and who have been good judges. So it was always the plan of the Reagan administration to give great weight to the recommendations of Senators, even when we were asking for three to five names.

As I have indicated earlier, with respect to circuit courts we did feel differently because they span more than one State, and while those courts had seats that were more or less regarded as State seats, we thought that it was not a necessary ingredient of the process that the Senator have the last word on circuit court vacancies.

Senator MATHIAS. Thank you very much.

The CHAIRMAN. The distinguished Senator from Pennsylvania, Mr. Specter.

Senator SPECTER. Mr. Chairman, while I would like to ask more questions, I am not going to at this time. But I would think it helpful if Mr. Schmults and Mr. Rose would be here when Mr. Buesser testifies and the other ABA people do because they may well want to respond.

And speaking for myself, I would like to have the opportunity at that time on a more important phase to see if anyone identifies any conversations which have not come to light so far.

The CHAIRMAN. Senator, when Mr. Schmults accepted the invitation, he stated that he was to speak to the American Bar Association this afternoon and he wanted to get away as quick as he could. We have kept him here until 25 minutes until one, he must leave in order to keep his appointment but Mr. Rose will be here the rest of the afternoon.

Can you not remain, Mr. Rose, and be available?

Mr. ROSE. I had not planned on it, Senator, but if it is desired, I certainly will.

Mr. SCHMULTS. Let me check, Mr. Chairman. It may be that I now will be unable to make this panel. I worked on a paper for weeks and I am participating with four other people to an audience of several hundred people. I believe I have missed it; if I have, I will be happy to be here because I want to do everything I can to see that Jay Wilkinson is confirmed.

The CHAIRMAN. We are very sorry that you have been detained this long. Of course, we could not avoid that, but if you can be here then, Mr. Schmults, it would be helpful, I think—you and Mr. Rose both.

Ms. OSOLINIK. Excuse me, Mr. Chairman. If the other Senators are finished, I think pursuant to Senator Kennedy's arrangement with you——

The CHAIRMAN. Yes, I was coming to you.

Ms. OSOLINIK. Thank you.

The CHAIRMAN. Do any other Senators have any questions now? [No response.]

The CHAIRMAN. If not, we are going to do an unusual thing, and that is in allowing a staff member representing a Senator to propound questions, if she desires to do so—Ms. Carolyn Osolinik, staff member to Senator Kennedy.

And I would suggest to you, the same as the others, if you can avoid any duplication, we would appreciate it.

Ms. OSOLINIK. Certainly, Mr. Chairman.

The CHAIRMAN. You may proceed.

Ms. OSOLINIK. Thank you.

Mr. Schmults, when did Mr. Wilkinson first begin to be considered by the Justice Department for the fourth circuit vacancy?

The CHAIRMAN. If you do not mind, speak in your microphone so we can all hear you.

Mr. SCHMULTS. I do not really have those dates in mind. I can place it in terms of other events, and it was on or about the time that Kenneth Starr was nominated to serve on the District of Columbia Court of Appeals, but I quite frankly do not know when that was. I do not recall that.

Ms. OSOLINIK. Mr. Rose, do you know when it was?

Mr. ROSE. Well, I think he was on the list of people to be considered for quite some time. Those vacancies existed for quite a period. I do not have the precise date, but I think it may have been even earlier than Ed mentioned just now.

Ms. OSOLINIK. Would he have been under consideration as early as December 1982?

Mr. ROSE. You have got me. I would have to know when the date of the vacancy was and I am just not sure.

Ms. OSOLINIK. Would you be willing to provide that information to the committee?

Mr. ROSE. Sure.

Ms. OSOLINIK. Thank you.

Mr. SCHMULTS. Wait a minute; we cannot provide it. I cannot provide that information to the committee. I am not with the Justice Department anymore. I am now a lawyer and a private citizen; I have no access to that information.

Mr. ROSE. We could ask Justice to provide it.

Ms. OSOLINIK. Would you be willing to request that information from the Justice Department?

Mr. SCHMULTS. I would not, but you may.

Ms. OSOLINIK. Mr. Schmults, how did you first hear that Mr. Wilkinson was interested in the fourth circuit vacancy?

Mr. SCHMULTS. I believe he told me.

Ms. OSOLINIK. And do you recall when that was?

Mr. SCHMULTS. No—excuse me. I really cannot place these events in terms of chronology and dates. There were a vast number of judicial appointments we were running through all the time and I do not recall those specific dates.

It was, as I said earlier, sometime—and this is a date that you can easily find out—it was sometime, I think, shortly before the nomination of Ken Starr came up for the District of Columbia Court of Appeals; not for the fourth circuit, but for the District of Columbia Court of Appeals.

Ms. OSOLINIK. Were you hearing from anyone else early on about the Wilkinson candidacy, either from Brad Reynolds or Justice Powell?

Mr. SCHMULTS. No, not to my recollection.

Ms. OSOLINIK. Mr. Schmults, I believe that you testified earlier that you had worked closely with Jay Wilkinson for 2 years, and I am wondering in what context that was that you worked closely with him.

Mr. SCHMULTS. Yes. Jay Wilkinson was a Deputy Assistant Attorney General in the Civil Rights Division. The Assistant Attorney General for the Civil Rights Division reported to me as the Deputy Attorney General, and therefore in many meetings that I had with Mr. Reynolds, Mr. Wilkinson was there and, of course, participated actively.

And then, of course, sometimes when Mr. Reynolds was not there, I would meet with Mr. Wilkinson, and indeed I interviewed Mr. Wilkinson for the post that he had in the Department. So I believe that I worked as closely with Mr. Wilkinson as I did with just about anybody else at the Deputy Assistant Attorney General level.

Ms. OSOLINIK. Mr. Schmults, Mr. Wilkinson's personal data questionnaire indicates that he served as the Deputy Assistant Attorney General of the Civil Rights Division from July 1, 1982, to August 10, 1983. That would be about 1 year, would it not?

Mr. SCHMULTS. Well, then, amend my two to—when I said nearly two, I was guessing. I did not look that up or attempt to look that up. Whatever that period of time is on the résumé, I am sure it is accurate.

Ms. OSOLINIK. Mr. Schmults, what date was the Wilkinson nomination first sent to the ABA committee?

Mr. SCHMULTS. I do not have that information.

Ms. OSOLINIK. Mr. Rose, do you recall?

Mr. ROSE. I do not recall. You could ask the Justice Department for that.

Ms. OSOLINIK. Was there any indication, Mr. Schmults, that the Wilkinson nomination could run into trouble with the ABA when it was first sent up?

Mr. SCHMULTS. Not that I was aware of.

Ms. OSOLINIK. Mr. Rose.

Mr. ROSE. None that I was aware of at all.

Ms. OSOLINIK. Mr. Schmults, during the ABA consideration of Mr. Wilkinson, whom did you talk to at the Department of Justice about the nomination? For example, did you talk to Bruce Fein?

Mr. SCHMULTS. I am sure I would have talked to Bruce Fein because he worked with me in my office.

Ms. OSOLINIK. Did you talk to Mr. Fein after you learned the nomination was in trouble?

Mr. SCHMULTS. It would be surprising to me if I had not.

Ms. OSOLINIK. Did you talk to Brad Reynolds?

Mr. SCHMULTS. I am sure I did.

Ms. OSOLINIK. After you learned the nomination was in trouble?

Mr. SCHMULTS. I am sure I did.

Ms. OSOLINIK. You mentioned that when you talked to Justice Powell after you learned the nomination was in trouble, you suggested that he do whatever he felt comfortable doing with that information. Would you have made similar suggestions to Mr. Fein and to Brad Reynolds?

Mr. SCHMULTS. I may well have. I do not recall doing that.

Ms. OSOLINIK. Mr. Schmults, did you obtain information about what was in the ABA report?

Mr. SCHMULTS. Specifically, no, I did not see the report. About the only piece of information that I can recall at this time that I may have been aware of was that there was an unfavorable recommendation from someone who worked on the newspaper with Mr. Wilkinson. This is the only item that I can recall with any specificity, and at no time was I aware of the identity of that person and it was only a vague reference, as I recall.

Ms. OSOLINIK. Was there anything else specific in the report that you were informed about?

Mr. SCHMULTS. I do not believe so.

Ms. OSOLINIK. Mr. Rose, what did you learn about the contents of the report?

Mr. ROSE. I really did not learn much about the contents of the report. I have a similar recollection to that of Mr. Schmults of some unfavorable reference by a colleague on the newspaper in Norfolk.

But I just had the general impression that the report might ultimately conclude that Jay's experience in the trial courts had not been sufficient to permit him to be given a qualified recommendation.

Ms. OSOLINIK. Mr. Schmults, when did you learn that Mr. Lane would be asked to do a separate ABA report on the nominee?

Mr. SCHMULTS. I do not recall when I was made aware of that. It was probably on or about the time that Mr. Rose advised me that the committee might be coming down in an unfavorable way, although it does surprise me now that I might not have learned about that earlier. But I do not recall. I think it was on or about that time, and I am sure that I would have learned it from Mr. Rose, who had direct and continuing contact with the committee.

Ms. OSOLINIK. Mr. Rose, when did you find that a potential problem was found to exist?

Mr. ROSE. I think it was substantially earlier that that could be an ultimate conclusion of the committee or at least thought to be possible. It was, I think, thought that since this could be a controversial nomination within the committee that it might be useful to have two people working on it. As I have said before, that was the practice the committee had followed under its previous chairperson quite routinely.

Ms. OSOLINIK. Approximately, Mr. Rose, when would you have learned that?

Mr. ROSE. I have no specific recollection of that; I am sorry.

Ms. OSOLINIK. Some time significantly earlier than November 3 or 4, I would imagine.

Mr. ROSE. I simply just do not have a recollection of it. As I say, we were handling a number of these appointments and the specifics of what happens during any one of them does not tend to stick in one's mind. The date that it happened I simply do not recall.

Ms. OSOLINIK. It was your understanding, was it not, Mr. Rose, that if a second investigator was being appointed that there was some controversy or question about the nomination?

Mr. ROSE. That it would be useful to have someone else taking a look at this nomination and do a further or a supplemental investigation; that was the conclusion that I understand the chairman had reached.

Ms. OSOLINIK. Mr. Schmults or Mr. Rose, did either of you participate in any way in the decision to involve Mr. Lane in the investigation?

Mr. ROSE. No. Who staffs an investigation is purely the decision of the committee, and typically of the chairman and who is available. It is certainly not our province to suggest any particular member; we never did.

Mr. SCHMULTS. I am sure I did not participate in that decision.

Ms. Osolinik. Mr. Rose, did you have any discussions with Mr. Lane while he was preparing his report?

Mr. Rose. I may have casually seen him in Washington, but I certainly did not meet with him for the purpose of discussing it.

Ms. Osolinik. Did you, Mr. Schmults, have any discussion with Mr. Lane while he was preparing his report?

Mr. Schmults. I do not recall initiating any discussion. I would like to think that he may have called me to ask me what I thought about Mr. Wilkinson. But, quite frankly, I do not even recall that happening, so I am not sure that I had any conversation with him at all. I know I did not initiate a conversation.

The Chairman. Your time is up, but we will give you some additional time if you think you can finish here.

Ms. Osolinik. Thank you, Mr. Chairman; I do have additional questions.

Mr. Rose, whom did you talk to about the negative report that was being prepared for Mr. Wilkinson? After you learned that there was a possibility of a negative review, who did you talk to about that?

Mr. Rose. Well, typically, when we ran into that kind of situation, I would have talked to Mr. Schmults, and I know I did in this case.

Ms. Osolinik. Did you talk to anyone else?

Mr. Rose. It is conceivable that I could have, but since Mr. Schmults and I were the two people that routinely attended the judicial selection meetings at the White House, he would be the main person I would have talked to.

I could have also conceivably discussed it with Fred Fielding, although I have no specific recollection of so doing.

Ms. Osolinik. Did you talk with anyone else at the Justice Department about it?

Mr. Rose. It is quite possible, but I just do not have a specific recollection of it.

Ms. Osolinik. Did you talk to anyone on the Supreme Court about it?

Mr. Rose. No.

Ms. Osolinik. When you talked with Mr. Fielding at the White House, did you suggest that anything be done about this possible negative report?

Mr. Rose. Well, I said I could have talked with Mr. Fielding because Mr. Fielding and I talked about a lot of things pertaining to judicial nominations. I did not say that I specifically had, and I certainly do not recall our coming up with any conclusion as to something specific to be done about this particular nomination.

Ms. Osolinik. Mr. Schmults, I believe you said you did talk with Mr. Fielding about the possible negative ABA report.

Mr. Schmults. Yes.

Ms. Osolinik. Did you suggest that anything be done about it?

Mr. Schmults. No, I do not believe I did. If I had suggested anything, I might have suggested that Mr. Fielding call someone, but I do not believe I did. I think I just advised him of our effort to provide additional information to the committee.

Quite frankly, I do not even remember doing that. What I am basing my answer on is that it would have been my practice to have advised Mr. Fielding when one of the President's prospective judicial nominations might be having a problem either with the FBI or the ABA. I would typically advise Mr. Fielding.

Ms. OSOLINIK. Would you have advised Mr. Fielding of your efforts on behalf of Mr. Wilkinson, such as calling Justice Powell?

Mr. SCHMULTS. I do not know the answer to that. If indeed I talked to Mr. Fielding, I probably would have advised him of my efforts, yes.

Ms. OSOLINIK. With respect to the November 4 meeting with Mr. Wilkinson and Mr. Schmults and Mr. Rose, Mr. Rose, who initiated that meeting?

Mr. ROSE. I really do not recall that.

Ms. OSOLINIK. Mr. Schmults, do you recall?

Mr. SCHMULTS. No, I do not recall who initiated it.

Ms. OSOLINIK. Was it held at the Justice Department?

Mr. SCHMULTS. Yes.

Ms. OSOLINIK. Mr. Rose, what specifically did you tell Mr. Wilkinson about what was going in the ABA committee concerning his nomination at that November 4 meeting?

Mr. ROSE. My general recollection of what I said to Mr. Wilkinson was that there was considerable concern in the committee that had been reflected to me in the normal way by the chairman that his particular background and trial experience was raised as a question by some.

There were others that had perhaps raised some personal criticisms, and the one that I can specifically remember is the one that emanated from the newspaper, but that the general condition was such that it was at least conceivable that he might not be approved.

And I must say I think both the deputy and I found that to be a rather inconceivable state of affairs, given Mr. Wilkinson's preeminent record and background and our own experience in working with him.

Ms. OSOLINIK. Did you tell him anything else about the ABA committee deliberations?

Mr. ROSE. I do not recall specifically what I told him about the ABA committee deliberations. I must say again that this whole focus of the inquiry on what we told Mr. Wilkinson is novel at best. I found nothing improper in our discussions with Mr. Wilkinson because I felt that a nominee is entitled to know where he stands before a committee that is about to pass upon his qualifications.

The only thing that I was very sensitive about throughout in my 3 years of relationships with the ABA was not to convey to a nominee derogatory information about him in such a way that he could identify the person who was the source of the information.

To me, that was the aspect of the ABA deliberations that would have been sensitive. We in no way conveyed to Mr. Wilkinson any kind of ability to identify anybody who had said anything derogatory about him. But we did encourage him to provide to the committee whatever favorable information about his background that he had and we knew that he had in his possession because we thought he was fully qualified.

Ms. OSOLINIK. Did you suggest to Mr. Wilkinson that he have others contact the ABA committee members?

Mr. ROSE. We may well have if they had particular information that the committee did not yet have or did not reflect. We were frankly quite concerned during the course of that investigation, as Ed has said here several times, that a lot of people that had relevant information and favorable information to Jay Wilkinson were not being contacted, or at least were being contacted in a sufficiently cursory fashion that we were not sure that that favorable information on Jay's experience, background, and performance had fully gotten through to the committee.

Ms. OSOLINIK. Did you suggest to any specific individuals that it would be useful to have contact the ABA committee?

Mr. ROSE. I do not recall doing that because—I could have, but I just do not recall doing it.

Mr. SCHMULTS. I would like to volunteer a point here. You know, we are talking about, as I said in my preliminary testimony, a human being, a very fine human being, Jay Wilkinson.

I am not suggesting the ABA committee is in any sense acting as accusors here, but it seems to me that elemental fairness requires that Mr. Wilkinson have a chance to respond and provide additional information to the committee when he is advised that the committee may be acting in an unfavorable way.

And indeed the ABA committee felt so strongly about that that they worked with us in a cooperative fashion in connection with another candidate to sit down at a table, and we did for 3 hours, and they had a stack of papers this high before them and they ran through the allegations. And the applicant had a chance to respond to the allegations and to try and persuade the ABA committee that the action that it was going to take, which dramatically affects a person's life and career and standing in the community, should be reversed.

And it seems to me that this process is a good one. It is a fair process. We ought to have advised Mr. Wilkinson; I am glad we advised Mr. Wilkinson. And I am very glad that we provided additional information to the committee.

I would like to think that that additional information resulted in the committee finding Mr. Wilkinson, by a substantial majority, qualified, he is qualified. He will make a fine judge, and it was a good process.

Ms. OSOLINIK. Mr. Rose, what did you tell Mr. Wilkinson about the timing of the ABA committee vote?

Mr. ROSE. I think we may have told him, whenever it was to be, that our understanding was that it was to be at that particular time. And, frankly, I find nothing wrong with that anymore than I would find anything wrong with telling somebody that the Senate Committee on the Judiciary plans to have a vote at 10 o'clock next Tuesday on a nomination.

Ms. OSOLINIK. What was your understanding of the timing of the ABA——

Mr. ROSE. I do not remember, but I was rather surprised when I read all this material and found that an issue was being made that we had informed Mr. Wilkinson when he might be voted on. I was very surprised.

Ms. **Osolinik**. What did you tell Mr. Wilkinson at the November 4 meeting about sharing the information that you were providing to him about the report of the ABA?

Mr. **Rose**. I do not think we provided any information about the report.

Mr. **Schmults**. We did not know what was in the report.

Ms. **Osolinik**. I believe that Mr. Rose said that based on your discussions with the ABA, you knew that there was a concern about Mr. Wilkinson's lack of trial experience. I assume that that was part of the report.

Mr. **Rose**. I said we knew——

Mr. **Schmults**. The ABA told us that right from the very beginning. They have a requirement; they like to have people with so much trial experience. We were well aware when we sent that nomination up, as we were with Dick Posner, as we were with Nino Scalia, as we were with Ralph Winter, that the committee would have to be persuaded that the candidate had other qualifications and other attributes that would cause the ABA committee not to rigorously enforce its guideline.

In the case of those other judges, in the case of Stephen Bryer, the committee did not.

Ms. **Osolinik**. Mr. Schmults, the reason I ask the question is because of Mr. Buesser's November 22 letter, in which he says:

> I understand the pressures under which the Justice Department was operating, but I do want to make sure that there is not a repetition of this breach of security whereby numerous people knew specific details of confidential information shared with you which were obviously conveyed to the candidate.

Mr. **Rose**. Well, look, we phrased the letter and reply very carefully because, very frankly, I was quite surprised to receive the letter complaining about revealing the timing of the vote. I just did not consider that confidential.

I have explained to you what we considered confidential. Mr. Buesser said in his letter that there were people on his committee that had been concerned. And these were new people on the committee and to the extent that they were concerned, we wished to restore an effective working relationship, which we believe we had, and we believed we still had and continue to have.

Mr. **Schmults**. You know, there is a very important point here and I am really glad you focused on it because it allows me to make a point that I have overlooked. I do not believe that anyone at the Justice Department that I know of—and certainly I did not share with anyone specific details of the type referred to by Mr. Buesser in his letter.

I think what you may find is that the ABA committee, like any other committee, like any Government agency—leaks, and when people would call up committee members, and in many cases they are friends, there was information that might leak.

Other committee members, I am sure, were not certain that it came from the Justice Department or one of their fellow committee members. But the ABA committee is aware of this problem, and indeed anyone who has functioned in an organization in a quasi-political environment knows that anytime you have a committee, information may leak from that committee.

So I think Mr. Buesser was concerned, as he should be as chairman of the committee—Ms. Brooksley Born was before him—about information leaking from the committee, and this was a matter of continuing concern with us at the Department and with the committee.

So as to whether the Department was responsible for any such leaks—and I know of none in this case as to specific information in the report—I believe that information could have well come from other committee members.

Now, I am in no position to assert that as a fact. I am just suggesting there are numerous sources for this information to have been made known to other people. I did not know what was in that report.

Ms. OSOLINIK. Mr. Schmults, you have no idea what Mr. Buesser is referring to when he talks about numerous people knowing specific details of confidential information?

Mr. SCHMULTS No. Quite frankly, I do not know what he is talking about.

Ms. OSOLINIK. Mr. Chairman, with your indulgence, I am almost finished.

Mr. Schmults, I believe that you have said that you met on a number of occasions with Mr. Buesser; that Mr. Buesser was your basic contact with the committee. Is that correct?

Mr. SCHMULTS. Well, no. Mr. Buesser was a recent chairman—is the recent chairman of the committee. I met with Brooksley Born before that; she was the chairman of the committee for the major portion of the time I was at the Department of Justice.

Ms. OSOLINIK. But during Mr. Buesser's tenure as chairman, is not Mr. Buesser your normal contact with the committee?

Mr. SCHMULTS. Yes; the chairman of the committee is the normal contact.

Mr. ROSE. Could I expand on that just briefly? The fact of the matter was we faced in this investigation a changing of the chairmanship of the ABA committee. Routinely, a deputy in my office handled the day-to-day relationship with the chairman of the committee during the vast number of district judges we appointed—the status reports as to where the investigation stood.

When investigations became at all complicated as Ed Schmults has already said—he and I would become involved.

Up until that particular time we had not had frequent contact with Mr. Buesser because I think Mr. Buesser had been in office about a month. We had been previously dealing with Brooksley Born routinely. By and large, on routine matters where there are no controversies at all—they are simply straight recommendations and they go through—the chairman often deals either with me or someone in my office and not Ed Schmults.

When it comes to a situation of this type, Ed Schmults would be the principal contact of the chairman, but this was just a month into his chairmanship. So we had not established a working relationship yet of the same duration that we had had for the prior 2 years with Brooksley Born.

Ms. OSOLINIK. Did your meeting with Mr. Wilkinson on November 4 take place shortly after you learned that there was a problem with the nomination?

Mr. Rose. I do not think it was shortly after we knew there was a problem with the nomination.

Mr. Schmults. Yes. I do not recall when the November 4 meeting occurred, but I have a recollection that we did meet with Mr. Wilkinson shortly after we became aware of the fact there would be a problem in the committee—a perfectly normal, natural thing to do. I believe I would have been negligent had I not met with Mr. Wilkinson at that time.

Ms. Osolinik. Mr. Schmults, since the chairman of the committee was your usual contact with respect to the nominations and the ABA evaluation, if you just wanted to be certain that information was conveyed to the committee about the nominee, why did you not just tell Mr. Buesser? Why did you call, I believe you said Mr. Van Dusen and perhaps Mr. Fisk?

Mr. Schmults. Well, I think it is the other way. I think perhaps I called Mr. Fisk. I believe I tried to reach both of them. I am not sure which person I did, in fact, speak to, perhaps both.

I did tell Mr. Buesser the same thing, and I told Mr. Fisk the same thing and I would have liked to have told, if I talked to him, Mr. Van Dusen the same thing. And indeed I would have liked to have met with the committee and told each member of the committee the same thing because I would hope that they would think that my views would be relevant to their individual vote.

I did not have the opportunity or the time to do that, but I did call, as I say, Mr. Fisk, because I have known him for a number of years.

Mr. Rose. Well, in fact, I think you called Mr. Buesser at quite some length.

Mr. Schmults. Yes. You know, I did spend——

Ms. Osolinik. But was it not your understanding that under the ABA process any information that any committee member received about a prospective nominee would be shared with the entire committee?

Mr. Schmults. Well, that is fine; I have no quarrel with that. I do not know whether that is true or not, but I would like to think that the depth of my personal conviction about Mr. Wilkinson might be persuasive with some other members of the committee, so I had no reluctance about calling them, and indeed would do so again.

Ms. Osolinik. So that your call was really more than just conveying information, since you could have conveyed information to Mr. Buesser and it would have gotten to everyone?

Mr. Schmults. No. I believe when you convey information, you can convey it most effectively either face to face or in a direct communication with the person to whom you wish to convey the information.

It is certainly true that something gets lost in translation, so if I want to convey information to people, I like to talk to them directly and not through third parties.

Ms. Osolinik. Mr. Rose, I believe that you said that other officials at the Department of Justice may have made telephone calls to committee members. Who would those other officials have been?

Mr. ROSE. I would be purely speculating, and I do not know that any were made. I think you have got the committee here; you could ask them.

Ms. OSOLINIK. Did you talk to anyone else at the Justice Department about making phone calls to committee members?

Mr. ROSE. I do not recall doing that. I could have, but I do not recall that I did. As I say, I think the committee will be the best source as to who contacted them.

Ms. OSOLINIK. Mr. Schmults, you mentioned that there were weekly meetings at the White House on nominees, and the Wilkinson nomination was over at the ABA for quite a while before there was a final vote.

Did you ever discuss any progress report on the Wilkinson nomination at the weekly meetings at the White House?

Mr. SCHMULTS. Oh, I am sure we did. There was a schedule that was prepared about where things were in the process or on what date a candidate's name was sent to the FBI.

The CHAIRMAN. I do not want to rush you now, but you have had 30 minutes, I am informed. Are you almost through now?

Ms. OSOLINIK. Yes, Mr. Chairman. If Mr. Schmults could just complete this answer, it might be the last one.

Mr. SCHMULTS. All right. Yes, I am sure I would have discussed the status of not only the Wilkinson nomination, but others that were pending at various places, either at the FBI or ABA; particularly those that were taking long periods of time would be discussed.

If selections were going through in the normal process, they generally would not come up. There was a schedule that indicated where they all were.

Ms. OSOLINIK. Mr. Schmults, did you ever suggest to Mr. Wilkinson that he have any specific individuals contact ABA committee members?

Mr. SCHMULTS. If that had come up, it would have been at the November 4 meeting. I am sure that we discussed then the desirability of having people who were aware of his qualifications provide that information to the ABA.

I did not suggest that calls be made to any specific members, but only that I thought it would be helpful to his candidacy if the ABA received supplementary information from people who would be respected by members of the committee.

Ms. OSOLINIK. And my last question: When you talked with Justice Powell, that was after you had learned of the negative report?

Mr. SCHMULTS. That was after—I do not know if I learned of a negative report. I do not want to phrase it that way.

Ms. OSOLINIK. After you learned that it was serious?

Mr. SCHMULTS. After I had understood from Jon Rose that there was a possibility that the vote of the committee might be unfavorable, it was at that time, following my receipt of that information, that I called Justice Powell.

Ms. OSOLINIK. And did Justice Powell tell you what he intended to do with the information you had given him?

Mr. SCHMULTS. No; he did not. He just said he would think it over.

Ms. OSOLINIK. Thank you. That is all, Mr. Chairman. Thank you very much.

The CHAIRMAN. Thank you.

Now, we want to thank you, gentlemen. You have been here since 10 o'clock, over 3 hours, and you have been very patient. It is desired by some Senators that you remain, if you can, for the rest of the day.

Now, Mr. Schmults, if you can still make your appointment in Chicago, you may leave. Mr. Rose will remain if possible. After lunch we will hear testimony from Mr. Buesser, chairman of the ABA Committee on the Judiciary; Mr. Howard, Mr. Lane, Mr. Lafitte, Mr. Dunnings, and Mr. Hewitt, members of the committee.

Are they all here?

Mr. BUESSER. Yes, they are.

The CHAIRMAN. Thank you very much. You are most cooperative and we appreciate your being here.

Mr. BUESSER. Thank you.

The CHAIRMAN. We are sorry to have delayed you all so long, but we will take you the first thing after lunch.

Now, we are going to recess now until 2:15, at which time we will come back and resume the hearing.

[Whereupon, at 1:08 p.m., a luncheon recess was taken.]

[The committee reconvened at 2:17 p.m., Hon. Strom Thurmond (chairman of the committee) presiding.]

The CHAIRMAN. The committee will come to order.

It is now requested that the members of the ABA Committee on the Judiciary come to the table here.

Mr. SHORT. All six people, please come forward.

The CHAIRMAN. We will have additional chairs put there if there are not enough.

Mr. BUESSER. Did you ask all of the committee members?

The CHAIRMAN. I think we will have them all come up at one time.

Mr. BUESSER. Thank you.

The CHAIRMAN. Mr. Buesser, you are the chairman.

Mr. BUESSER. I would like the privilege——

The CHAIRMAN. Would you introduce these other members to us?

STATEMENT OF MEMBERS OF AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIARY, FREDERICK BUESSER, JR., CHAIRMAN, JOHN LANE, GENE LAFITTE, JAMES HEWITT, JAMES HOWARD, AND STEWART DUNNINGS

Mr. BUESSER. I would like the privilege, sir, of introducing the members of my committee that are here in response to your invitation.

The CHAIRMAN. We would be very pleased to have you do that.

Mr. BUESSER. On the far left, Stewart Dunnings of Lansing. Immediately next to me on my left, James Howard of Norfolk, VA; on my far right, James Hewitt of Lincoln, NE; next to him, Mr. Gene Lafitte of New Orleans, LA; and on my immediate right, John Lane of Washington.

And in the courtroom, you should know that sitting back here is Brooksley Born. You know her as the former distinguished chairman of our committee, and immediately next to her, Robert Fiske, of New York, who is the incoming chairman of the committee.

The CHAIRMAN. Now, would you gentlemen kindly rise and be sworn?

The testimony you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BUESSER. I do.

Mr. LANE. I do.

Mr. LAFITTE. I do.

Mr. HEWITT. I do.

Mr. HOWARD. I do.

Mr. DUNNINGS. I do.

The CHAIRMAN. Mr. Buesser, would you explain the ABA rating system and tell the committee approximately what percentage of judicial candidates receive qualified ratings and in how many instances has a second investigator been assigned?

Mr. BUESSER. We have compiled some statistics, Mr. Chairman, with reference to the number of ratings of exceptionally well qualified, well qualified, and qualified, over the years 1977 through 1984, August 1. We have found 30 candidates exceptionally well qualified, 212 well qualified, 212 qualified, and 11 not qualified.

There have been a number of instances, set forth on page 7 of my letter of today to you, in which there have been two or more investigative members of our committee assigned to an investigation.

That does not necessarily mean that there was a finding of a lack of qualification. It may mean in some instances nothing more than the fact that there were geographical associations which the candidate had which required people in different parts of the country to review his record.

A number, however, have been situations in which some troublesome material developed or threatened to develop, and because the committee wanted to make sure that a full and fair investigation was conducted, we wanted to have the input of more than one person.

The CHAIRMAN. Your response of August 6, 1984, or your letter to me, rather, dated that date, I presume you would like to go into the record, would you not?

Mr. BUESSER. I would. If the chairman would so agree, I would like to have my letter of August 6, 1984, addressed to you, made a part of the record.

The CHAIRMAN. Without objection, so ordered.

[Material submitted for the record follows:]

American Bar Association

Rec'd
9:40 pm
8/6/84

August 6, 1984

CONFIDENTIAL

The Honorable Strom Thurmond
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

I respond to a request of Senators Kennedy, Metzenbaum and Biden dated August 3, 1984 and delivered in Chicago on the afternoon of Saturday, August 4 while in attendance at the Annual Meeting of the American Bar Association, to supply certain documents and information in connection with a hearing to be held before The Senate Judiciary Committee on J. Harvie Wilkinson, III at 10:00 a.m. Tuesday morning, August 7.

The information requested was described in eleven separate paragraphs. I made arrangements for my file on the Wilkinson matter to be specially shipped to me and I received it Sunday afternoon, August 5. This letter is being dictated by telephone to my secretary from my hotel room in Chicago.

Response to the specific requests is as follows:

1. The following is a detailed chronology of our Committee's proceedings pertaining to the investigation of Professor Wilkinson from July 28, 1983 through March 12 and 13, 1984 when I responded to a March 5, 1984 letter from Senators Kennedy, Metzenbaum and Biden:

7/28 & 7/29/83	Receive request from Justice Department for Formal Report
	Receive completed Personal Data Questionnaire (PDQ) from candidate
	Acknowledge receipt of letters and PDQ, copies of which had been furnished to James Parham, retiring 4th Circuit member of the Committee
8/4/83	Parham forwards file to James Howard, new Committee member

	for the 4th Circuit and so advises candidate
8/26/83	Howard writes Chairman Buesser (Chairman) that there appears to be a problem with this candidacy and suggests that another Committee member assist him
8/29/83	Chairman telephones John Lane, D.C. Circuit member of the Committee, who agrees to assist in the investigation
8/31/83	Chairman writes Lane confirming the understanding that he will assist Howard
9/15/83	Chairman writes Howard inquiring as to progress in the investigation
10/18/83	Chairman writes Howard concerning progress in the investigation
10/28/83	Howard writes Chairman enclosing Informal Report and attachments
10/31 thru 11/1/83	Phone conferences with Lane and Howard; Lane is sending his Supplemental to both Chairman and Howard
	Chairman having reviewed both Lane and Howard sections advises Howard to put them together and circulate when he gets the Lane data
11/3/83	Rose and Schmults telephone Chairman who shares with them the differing opinions of Lane and Howard and advises that he has directed the reports be mailed out to all Committee members and indicates he expects to be able to give them the Committee's rating by 11/9
11/4/83	Howard letter to Chairman enclosing Formal Report "with John Lane's additional interviews attached" indicating that Howard finds candidate not qualified and that Lane disagrees. Copies to all Committee members
11/7 & 11/8/83	All Committee votes received by telephone except for one which is received on 11/10

11/8/83	Letter from Pfeiffer to Chairman complaining about telephone calls to him indicating confidential information
11/10/83	Justice Department advised that Wilkinson has been found qualified by a substantial majority of our Committee and not qualified by a minority
11/11/83	Candidate is nominated
11/14/83	Senate Judiciary Committee is advised of our rating
11/15/83	Letter from Gavin to Chairman regarding his having been contacted
11/22/83	Chairman's letter to Schmults and Rose complaining about breach of confidence
	Candidate's name withdrawn upon adjournment of Congress
11/23/83	Candidate's letter to Chairman acknowledging receipt of rating letter
12/22/83	Schmults letter to Chairman responding to his letter of 11/22/83
1/31/84	New formal letters to Senate Judiciary Committee and candidate after he was renominated following holiday recess
3/5/84	Kennedy, Metzenbaum and Biden letter to Chairman requesting information
3/12/84	Chairman responds to above
3/13/84	Chairman further responds

This data is reconstructed on the basis of files I have in Chicago and conversations with my secretary in Detroit who was in possession of certain Committee records. It is believed to be reasonably accurate given the circumstances under which it is compiled.

2.,3.,4. and 5. During the entire history of our Committee our reports as to candidates have never been released to anyone including the Justice Department and the Senate Judiciary Committee. The information contained in those reports is given under a pledge of absolute confidentiality to the sources we depend upon. Without that guarantee of total confidentiality we could not expect to receive the unqualified candor which is necessary in order

to ascertain the source's real feelings about the candidate. It is precisely because of this guarantee of confidentiality that our reports have been regarded as reliable and trustworthy and of great value both to the President and to the Senate Judiciary Committee. It has often been said that because of this guarantee of confidentiality our reports contain information which is not available to official government sources. The need for this total confidentiality has been recognized over the years by The President, the Justice Department and the Senate Judiciary Committee. Accordingly, we must respectfully decline to supply the information requested in items 2 through 5.

6. This request presents a different kind of problem. I shall attempt to be as helpful as possible because we recognize the particular relevance of the information sought.

a. When a Committee member not charged with investigation responsibility receives a formal report, he does not ordinarily contact anyone about it. If he has a question he might call the author of the report. So far as I know, no other members of the Committee initiated any contacts wither before or after receiving the formal report on Professor Wilkinson.

b. I was advised of telephone contacts made to the following Committee members, to the best of my present recollection: Messrs Hewitt, Harrington, Keane, Fiske, Dunnings, Lafitte, Gavin and Pfeiffer.

c. & d. The Committee has always jealously protected the privacy of its members in exercising their own untrammelled discretion by refusing to disclose how its various members voted. This is a precedent I am loathe to violate. Knowing something of the character and mind-set of our Committee members, I am convinced that no one who was contacted was influenced to any extent by such contact. It is a common thing to receive advice as to pending candidates and Committee members are thoroughly experienced in handling such contacts.

7. My secretary and I have reviewed correspondence in this matter. Such correspondence shall be supplied at tomorrow's hearing as it touches upon our contacts with the Justice Department and concluding with the exchange of correspondence in March, 1984 between Senators Kennedy, Metzenbaum, Biden and myself. It does not include correspondence of a personal nature or which would violate confidences of sources of information or internal committee correspondence. For the reasons previously noted in **response to requests 1 through 5, and for a host of additional reasons which are readily apparent, the Committee respectfully declines to furnish the balance of the information requested in #7.**

8. The Committee does keep meticulous records as to the vote cast by each Committee member by telephone and of the letters confirming such telephone votes. We have heretofore advised the Senate Judiciary Committee that Professor Wilkinson was found qualified by a substantial majoriy of our Committee and that a minority found him not qualified. With one exception, the votes were all cast on November 7 and 8. I would advise you that the vote was 10 to 4. I

personally found Professor Wilkinson qualified. Perhaps your question will be substantially answered if other Committee members are willing to indicate their votes at our Tuesday hearing.

9. Justice Department officials with whom the Committee has had close contact are uniformly extended invitations to both the Committee Annual and Mid-Winter meetings. Such was the case in July, 1983 and February, 1984. Minutes of those Committee meetings were taken and contain a great deal of material not germane to this inquiry by the Senate Judiciary Committee. We would regard those minutes as internal discussions of the Committee and privileged. I have, however, extracted the only material relevant to Professor Wilkinson which appears in either set of minutes. I want to take counsel with other members of our Committee with reference to making these extracts available and will advise you on Tuesday morning.

10. The following is a list by year of judicial candidates submitted since 1/20/77:

1977	45
1978	50
1979	180
1980	41
1981	63
1982	41
1983	40
1984	42 (thru 8/2/84)

The following is a list by rating of the number of candidates given each rating:

EWQ - 30 WQ - 212 Q - 212 NQ - 11

There were six (6) candidates given a not qualified rating who were subsequently nominated.

There were three (3) candidates given a not qualified rating who were subsequently confirmed.

The following is a list of specific instances since January 20, 1977 in which a second investigator was assigned:

A. Wallace Tashima	9th	2/22/80	Chappell Chavez
Myron H. Thompson	5th	9/13/80	Jones Dunnings
Stephen G. Breyer	1st	11/80	Harrington Silverman
Robert Potter	4th	8/14/81	Parham Jones
Robert B. Krupansky	6th	8/21/81	Dunnings Van Dusen
John L. Coffey	7th	10/9/81	Jenner Reuben Fiske

Harold M. Fong	9th	10/16/81	Gavin Sutro
Raymond L. Acosta	1st	6/25/82	Harrington Fiske
Shirley Wohl Kram	2nd	11/1/82	Fiske Harrington
Pasco M. Bowman, II	8th	11/5/82	Mossman Parham Fiske
Sherman E. Unger	CA FC	12/3/82	Coleman Van Dusen
Leonard D. Wexler	2nd	4/1/83	Fiske Harrington
Thomas G. Bull	6th	4/1/83	Holland Lafitte Rachman Dunnings Van Dusen
Kenneth W. Starr	D.C.	7/15/83	Parham Coleman
J. Harvie Wilkinson	4th	8/83	Howard Lane
John R. Hargrove	4th	9/83	Parham Howard
William D. Browning	9th	2/84	Pfeiffer Raven
Charles E. Wiggins	9th	7/84	Gavin Lane

This would not ordinarily assume that there had been a finding of not qualified by the first investigator. 11

The information supplied herein has been compiled on an emergency basis with much use of my able secretary Mrs. Deborah Willette and Brooksley Born's secretary Ms Deborah Ridgley. The material contained herein has been dictated and is believed reliable but has not been reviewed in its final form.

Respectfully submitted,

FREDERICK G. BUESSER, JR. dlw
Chairman

FGB/dlw
cc: The Honorable Edward M. Kennedy
The Honorable Joseph R. Biden, Jr.
The Honorable Howard M. Metzenbaum

Mr. BUESSER. Would the chairman indulge me in a few brief remarks?

The CHAIRMAN. Yes, sir, you go right ahead.

Mr. BUESSER. Thank you. The members of our committee whom you see assembled at the table here this afternoon came here directly last evening from the American Bar Association annual meeting being held in Chicago. We had notice of your request to come here only on late Friday and Saturday, and we had little time to assemble the substantial information which you asked for.

As my letter indicates, we have done the very best that we can.

The CHAIRMAN. We want to express our appreciation to you for doing it so quickly.

Mr. BUESSER. And we would hope, some of us, to get back to that meeting, although we have foresaken any hope of doing so today. We would hope that we will be able to get back late tonight.

There are a couple of things that I think it is of supreme importance for the committee to get across. First of all, we are grateful indeed to those Senators who have expressed confidence in the character and integrity of our committee, not only the present membership, but the membership of this committee which goes back a great many years, as you all know.

This committee has done over 1,400 investigations. We have been pleased to do them; we believe that, on the whole, they have been helpful. We do not take the position that our process is beyond criticism. We try to make it as objective as we can.

We are willing to listen to whatever criticisms you may have. One of the criticisms, however, that was made this morning—there was a reference to leaks by this committee, and I want to tell you that so far as I know, there were no leaks as a result of any actions of any member of this committee.

I think it is paramount to our committee's position here that your committee, Senator Thurmond, understand that there was only one report made in the Wilkinson investigation. There were not two reports, and nobody changed his vote.

The facts are that early on in the investigation, there was some data which came to the attention of the fourth circuit member, Mr. Howard, which led him to believe that there might be problems in connection with Mr. Wilkinson's investigation.

And he suggested to me, and I acted on that suggestion in appointing Mr. John Lane of the District of Columbia as a second member to assist Mr. Howard in conducting this investigation. They cooperated together, they consulted together. Mr. Howard interviewed some people; Mr. Lane interviewed others.

Together, Mr. Howard interviewed the candidate. Each submitted to me his portion of the report. I reviewed them, discussed them, and suggested that the way to handle this matter was to combine both reports, both sets of interviews, and the conclusions which each investigator used, put them all together in one package and send them out to our committee.

And that is what happened—there was one report and there was no opportunity given for anybody to change his vote. There was just one vote recorded. Now, you ought to know that when these formal reports are mailed out, the committee members are under an obligation to telephone their votes into my office as promptly as possible, and in this case the votes were all received on the 7th and 8th of November, except for one which arrived on the 10th of November.

And as I have indicated in my letter, those original votes, with none changed, were: A substantial majority found Mr. Wilkinson qualified; a minority found him not qualified. And I have further shared with you the fact that that vote was 10 to 4.

Senator METZENBAUM. Mr. Buesser, would you like to put in the record the copy of the letter that Mr. Howard wrote you on August 26, 1983, in which you indicate that he suggests that another committee member assist him?

Mr. BUESSER. Senator Metzenbaum, I was going to offer that letter to the committee, but our committee made a determination that in order to preserve its confidential processes, we were not going to offer or make available any intracommittee correspondence.

I have no personal objection to that, and indeed I think it is relevant to your investigation here.

Senator METZENBAUM. I think it is, particularly since——

Mr. BUESSER. And it certainly demonstrates that it was not the Justice Department who asked for another person; it was Mr. Howard.

Senator METZENBAUM. Well, I think it is relevant and I would like to ask your committee to reconsider because in your statement to us, you indicate the conclusion, but you do not give us the predicate in order to arrive at that conclusion, and I think that if we are going to have all of the evidence, I think that ought to be included.

Mr. BUESSER. Senator, I do not have the authority to do that. We are very cautious in exposing our internal processes. We believe confidentiality is so significant in our ability to evaluate candidates.

There obviously has to be a certain amount of interchange of views between committee people, and I do not want to get our committee into a situation in which we are afraid to write to each other.

I have no objection if you wish to place that letter in the record, Senator Metzenbaum, and I would certainly understand why you might like to do so. But I would respectfully decline your request to have the committee offer to put it in.

Senator METZENBAUM. I do not have it. May I have it so that I may place it in the record?

Mr. BUESSER. Well, sir, now you bring the issue to a more definite point.

Senator METZENBAUM. It certainly does. I cannot hardly put anything in the record that I do not have and that you have.

Mr. BUESSER. I thought perhaps you had that letter.

Senator METZENBAUM. I do not have that letter.

Mr. BUESSER. Well, the answer then is, Senator Metzenbaum, with the greatest regret and respect, I shall not offer it. We will take it under advisement with our full committee, and if the full committee authorizes me, I will be glad to do so.

Senator METZENBAUM. Mr. Howard, do you have any objection? I do not know who Mr. Howard is.

Mr. BUESSER. Mr. Howard is right here.

Mr. HOWARD. I am Mr. James A. Howard, and I am the one who did the initial report.

Senator METZENBAUM. Pardon?

Mr. HOWARD. I am the one who issued the initial report, though there is only one report that finally reached——

Senator METZENBAUM. Would you have any objection to your letter——

Mr. HOWARD. I do, sir; I do object. I do not want to destroy the confidentiality of our committee and its inner workings.

The CHAIRMAN. Well, the Chair would rule you do not have to do it because, as I understand, this is correspondence or communications among members of the committee. It is not a final report, but it is expressions of opinions among yourselves. Is that correct?

Mr. BUESSER. That is true, Senator Thurmond, and——

The CHAIRMAN. And it is considered confidential by you all?

Mr. BUESSER. We will be very glad, Senator Metzenbaum, to take this under advisement.

The CHAIRMAN. Now, if we demanded that some member of this committee put a letter in or express himself individually, well, that might be unfair to the rest of the members as well as to him.

Senator METZENBAUM. But is it not the fact that Mr. Wilkinson knew of the contents of that letter? He learned of the contents of that letter. Why can we not?

Mr. BUESSER. I do not know whether Mr. Wilkinson——

The CHAIRMAN. I do not know whether he knew or not.

Mr. BUESSER [continuing]. Whether Mr. Wilkinson learned of the contents of that letter or not; certainly not from us.

The CHAIRMAN. You can ask him later; he will be on the stand.

Senator METZENBAUM. All right.

The CHAIRMAN. Now, Mr. Buesser, I want to ask you this question: In rating Mr. Wilkinson qualified, was a double standard applied?

Mr. BUESSER. No, sir, it was not.

The CHAIRMAN. Do all members agree to that? If there is any disagreement, speak out.

Mr. HOWARD. None from here, sir.

The CHAIRMAN. Now, Mr. Buesser, you indicated in your letter that Mr. Wilkinson had the apparent capacity to become an outstanding appellate judge. Would you elaborate on that?

Mr. BUESSER. Yes, sir. The information which came to me and to other members of our committee was that Harvie Wilkinson was an able student as a young man, attended Lawrenceville School and then went on to take his undergraduate work at Yale, and was a distinguished scholar there; was awarded the Phi Beta Kappa key; was named a Scholar of the House, which is a high distinction; went to the University of Virginia Law School.

The CHAIRMAN. He was also magna cum laude at Yale, too, was he not?

Mr. BUESSER. Yes, I believe he was; went to the University of Virginia Law School, where he distinguished himself as a law student and was selected as a member of the Order of the Coif, which is one of the highest distinctions which a law student can earn, and in addition thereto was notes editor of the University of Virginia Law Review.

Thereafter, he was selected to clerk for Supreme Court Justice Lewis Powell—again, a very high honor for a law student and, interestingly enough, one of the few law students selected as clerk to a Supreme Court Justice who did not first put in a term of clerkship with a judge of a lower court.

You have already read into the record, and it is replete with Justice Powell's encomiums about Mr. Wilkinson's ability as a law clerk, in which he rated him among the very best that he had had.

He then became an assistant professor at the University of Virginia; passed from that rank to associate professor, ultimately full professor, at a very young age; has had a distinguished teaching record; has been honored for that teaching skill by both the faculty and the students; has written extensively on many legal subjects; has published as a young man three books, including the very well received "From Brown to Bakke," an analysis of the U.S. Supreme Court decisions touching on the invalidity of separate but equal; wrote a definitive treatise on Mr. Justice Powell; and has published yet a third book, the name of which is "Serving Justice, A Supreme Court Clerk's View."

The law review articles which he has written and the periodicals which we have seen are uniformly described by competent legal scholars as first rate in every respect, demonstrating a considerable ability to analyze, evaluate, and articulate legal principles.

Indeed, in this way it appears to me that he has demonstrated precisely those characteristics which one would like to see in an appellate court judge.

The CHAIRMAN. I believe he also served as Deputy Assistant Attorney General, did he not?

Mr. BUESSER. I am sorry, sir?

The CHAIRMAN. I believe he also served as Deputy Assistant Attorney General.

Mr. BUESSER. Yes. He served a period of about a year as a Deputy Assistant Attorney General in the Civil Rights Division.

The CHAIRMAN. And there he supervised, I understand, around 50 litigating lawyers.

Mr. BUESSER. That is true and, in addition, his teaching included a number of subjects, a full knowledge of which would, in my judgment, stand him in good stead in discharging his duties as a judge of the court of appeals.

The CHAIRMAN. Mr. Buesser, is the absence of trial experience disqualifying, in your opinion?

Mr. BUESSER. No, but it is not a plus. It is not disqualifying to me and it is not disqualifying to a majority of the members of our committee, and it is not disqualifying to a number of very learned judges with whom we consulted in the process of this investigation.

But I would have to say to you as a trial lawyer that I do have concerns about any person who goes on the bench who has not had any more trial experience than Mr. Wilkinson had, and I think that you have to have the very considerable, demonstrated intelligence and ability to articulate the law that he has in order to overcome that absence of trial experience.

The CHAIRMAN. In other words, if he had had trial experience, he would have been rated higher?

Mr. **Buesser**. If he had had trial experience, he would have been, without any question, rated well qualified by our committee.

The **Chairman**. Now, Mr. Buesser, would you discuss the role of the ABA and persons who voluntarily call with information about judicial candidates?

Mr. **Buesser**. Yes, I will, Senator Thurmond. The committee has developed over the years a method of attempting to insulate itself from the well-intentioned efforts of supporters of candidates who are before us for evaluation, and in that connection we listen carefully to what anybody wishes to volunteer, treat that informant courteously, and file the information away. We are not surprised to receive it. We indeed welcome all sources of information.

I would have to say to you, however, that is not the way we get the important information on which we rely. We get that from calls and contacts which we initiate with a multiplicity of sources which we believe to be reliable.

But it is not at all unusual for well-intentioned people, on their own initiative, to contact us, mostly in favor of a candidate.

The **Chairman**. Mr. Buesser, there has been a great deal of discussion among members of your committee and in public about this nomination. Has anything you have heard or learned led you to change your opinion that Mr. Wilkinson is qualified by reason of integrity, temperament and ability to serve on the appellate bench?

Mr. **Buesser**. Absolutely nothing.

The **Chairman**. Now, normally I believe you do not disclose how you vote on a nomination.

Mr. **Buesser**. That is true.

The **Chairman**. And I am not going to ask you to disclose individually now how you voted unless it is the desire of your members to do so. Do your members desire to express themselves on how each voted or not?

Mr. **Buesser**. Well, Mr. Chairman, I have already indicated in my letter of August 6 to you how I voted, and it is a matter of public record as to how Mr. Howard and Mr. Lane voted. And you know that there are four members of our committee who voted and found Mr. Wilkinson not qualified.

And I would suggest that if you were to ask questions of some of the gentlemen here, I feel that they would respond as candidly as I have as to how they voted, but I do not undertake to vote for them or to release that information for them.

The **Chairman**. Well, I do not want to ask them how they voted unless they want to state it.

Down at this end, Mr. Hewitt, if you would care to state how you voted on this nomination, you can do so, and I would also like to ask you this question: Did any so-called lobbying or other efforts or communications of any kind influence your vote?

Mr. **Hewitt**. Thank you very much, Senator Thurmond. I have no hesitancy in revealing my vote. I found Mr. Wilkinson qualified, and voted qualified. And although I was contacted, the contact which was made did not, in my opinion, influence my vote.

The **Chairman**. All right. Mr. Lafitte?

Mr. **Lafitte**. Senator, normally, my vote I would regard as confidential, for the reasons that we have been discussing here this morning. But because of the interest of this committee under the circumstances involved here, I have no objection to disclosing that vote.

I voted Mr. Wilkinson not qualified.

The CHAIRMAN. And I believe you were called by Justice Powell?

Mr. LAFITTE. That is correct.

The CHAIRMAN. Well, he did not influence your vote?

Senator METZENBAUM. When is your next case before the Supreme Court?

Mr. BUESSER. I do not think the witness ought to be asked to answer that question.

The CHAIRMAN. Did he influence your vote?

Mr. LAFITTE. No, he did not, Senator Thurmond.

The CHAIRMAN. Now, did any lobbying or communications received from anybody influence your vote?

Mr. LAFITTE. No, sir. I had one other contact from a citizen of New Orleans who had known Mr. Wilkinson in earlier years, but not for a long time professionally in any way. But I had no one influence my vote, Senator.

The CHAIRMAN. And that did not change your vote?

Mr. LAFITTE. It did not, sir.

The CHAIRMAN. Mr. Lane, would you care to state how you voted on this nomination?

Mr. LANE. Mr. Chairman, as you have heard, it has been disclosed—it was not disclosed by me, but it has been disclosed that I recommended to the committee that the committee find Professor Wilkinson qualified, and I so voted.

The CHAIRMAN. Were you influenced by the opinion of Justice Powell or anyone else on this matter?

Mr. LANE. Well, I would have to admit that my decision is the result of a whole series of interviews and discussions with people about the qualifications of the candidate.

Certainly the views of Justice Powell, being a distinguished jurist, a former president of the American Bar Association, a former president of the Virginia Bar, and a person who employed the candidate and who observed his work at a very close range, had a direct bearing on my overall evaluation of this candidate I would have to say—I don't like the word "influence," but it certainly had a bearing. Justice Powell was not the only member of the Court that I spoke to about this individual.

Of course, I called Justice Powell; Justice Powell did not call me.

The CHAIRMAN. He did not call you.

Mr. LANE. No, sir.

The CHAIRMAN. I see. And why did you call him?

Mr. LANE. At the time that——

The CHAIRMAN. Because Mr Wilkinson had worked with him and knew him? Or just why?

Mr. LANE. No, at the time—and I will try to do this without divulging too much of the internal processes of the committee—but at the time that Mr. Howard and I were preparing our report together, he was the lead man on the case and I was sending my material to him for inclusion in the report, and then he would send back to me his draft as it was going together. He had—and this has been also already disclosed by the Justice himself—he had earlier interviewed or called Justice Powell. Because Justice Powell at that time, for some reason, had indicated he did not prefer to have his name used in connection with the work of our committee, the initial draft that was to go to the chairman for his approval and for dissemination to other members of the committee was silent as to Justice Powell.

And it was my judgment that our report would not be complete unless we made an attempt to have Justice Powell authorize the use of his evaluation and his name. So with the chairman's concurrence, I placed a telephone call to Justice Powell at his chambers late one afternoon, and he immediately agreed to release the committee to use his evaluation. Thus, I was able to obtain from him his judgment as to the qualifications of Mr Wilkinson.

The CHAIRMAN. Do you feel that there were any improper influences exerted on you or attempted to be exerted on you concerning this nomination?

Mr. LANE. None whatsoever, Mr. Chairman.

The CHAIRMAN. Now, Mr Buesser, do you want to tell us how you voted, or not?

Mr. BUESSER. I already have in my letter, sir: I voted Mr. Wilkinson qualified because, as I have said in my several letters, I believe that he has the capacity to become an outstanding appellate court judge. He was remarkably well qualified for that kind of work, and I found so despite the fact that he had very limited trial experience; I found other attributes which he had which I was willing to accept as substitutes for that trial experience.

The CHAIRMAN. And do you feel there were any influences exerted or attempted to be exerted on you concerning this nomination?

Mr. BUESSER. No, sir; I do not.

The CHAIRMAN. Mr. Howard, would you care to say how you voted on this nomination?

Mr. HOWARD. It's a matter of record, at least in the press, how I voted: I voted negatively. I was not influenced by Mr. Justice Powell nor by anyone else; my vote was negative—not qualified.

The CHAIRMAN. Did Justice Powell talk to you?

Mr. HOWARD. Only at the beginning of the investigation, I initiated a call to him.

The CHAIRMAN. You initiated a call to him.

Mr. HOWARD. That's correct.

The CHAIRMAN. And he favored the nominee?

Mr. HOWARD. He did.

The CHAIRMAN. And you voted otherwise?

Mr. HOWARD. I voted otherwise against the nominee.

The CHAIRMAN. Mr. Dunnings, do you care to say how you voted?

Mr. DUNNINGS. I voted against the nominee.

The CHAIRMAN. Did anyone contact you about this?

Mr. DUNNINGS. Yes.

The CHAIRMAN. Or try to influence you—and you refused to be influenced, or what?

Mr. DUNNINGS. A black law student from the University of Virginia called me a day or so before I cast my vote. I continued to have the same feelings that I had prior to talking to him, and I cast a negative vote.

The CHAIRMAN. Did you feel any improper influences were used on you or attempted to be used on you concerning this nomination?

Mr. DUNNINGS. I thought it was improper for the law student to call me in the manner that he did. He indicated to me that he had been requested by the nominee to call me, and that he was a black student. You know, I have never had that done before in all of the time that I have been on the committee, to have someone to call me to at least indicate his background toward minorities. But it still did not influence my judgment.

The CHAIRMAN. It had no influence on you.

Mr. DUNNINGS. It had no influence on me

The CHAIRMAN. Let's see, you have 6 members here today, and you have 14 on your committee?

Mr. BUESSER. Yes, sir.

The CHAIRMAN. And what was the vote on this nomination?

Mr. BUESSER. Ten to four.

The CHAIRMAN. Ten to four in favor of the nominee?

Mr. BUESSER. Yes, sir.

The CHAIRMAN. Three of those who are here today voted against him, and the rest of you voted for him, and those who are absent voted accordingly.

Mr. BUESSER. Yes, sir.

The CHAIRMAN. So, as I understand it from all of you, whatever contacts were made, if any, did not influence any of you, but you voted your own opinions and own convictions and feelings about this nomination, is that right?

Mr. BUESSER. I believe that's a fair statement.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Have you had enough trial experience, Mr. Buesser, to recognize that as a leading question?

Mr. BUESSER. Yes, sir. [Laughter.]

Senator Metzenbaum, having sat through the Unger hearings as a spectator, I am not surprised to hear leading questions from that side of the bench.

The CHAIRMAN. I don't think it's necessary to go down and ask you all any more questions; I think we have brought out the key points here from all of you, and we will now pass on to other members of the committee.

The distinguished Senator from Ohio, Mr. Metzenbaum.

Senator METZENBAUM. Mr. Hewitt, you indicated that you were contacted by Justice Powell?

Mr. HEWITT. No, sir, I did not; I very carefully did not indicate by whom I was contacted.

Senator METZENBAUM. Tell me, who did contact you?

Mr. HEWITT. I don't believe that I am at liberty to indicate the name of the individual who contacted me, Senator, based upon the discussions which the committee had this morning concerning the confidentiality of our proceedings. However, I have no hesitancy in telling you, sir, that it was a lawyer in Lincoln, NE, the city in which I live. I was not contacted by Mr. Justice Powell, whom I doubt knows my name, although he has shaken my hand on one or two occasions, and I was not contacted by anyone from the Justice Department.

Senator METZENBAUM. And how do you explain the lawyer from Lincoln, NE, calling you? How did he know to call you, and under what circumstances would he just out of the blue call Mr. Hewitt about a fellow by the name of Wilkinson?

Mr. HEWITT. I came here from Chicago, Senator, and I haven't had a chance to check my file to make sure whether or not he told me that he had been asked by the candidate to contact me or not, and I very candidly cannot remember whether he told me that or, if he did tell me that, whether I wrote it down.

But I surmise that that is why he was calling me. He was familiar with Professor Wilkinson; he had known him well; we went into some questions about his background. I was specifically concerned about what might have been some indication of intellectual arrogance, and also about his attitude in regard to blacks and minorities, and I asked those questions of my caller.

Senator METZENBAUM. Well, isn't it a fact that the dean of the Nebraska Law School called you? I will tell you before you answer: Mr. Wilkinson says it was.

Mr. HEWITT. Then if in fact that information has been revealed, yes, I would say it was.

Senator METZENBAUM. And he is also in the academic field with Mr. Wilkinson.

Mr. HEWITT. Had taught with him at Virginia.

Senator METZENBAUM. Had taught with him?

Mr. HEWITT. Yes.

Senator METZENBAUM. Now, did anyone else call you?

Mr. HEWITT. No.

Senator METZENBAUM. Do you know the dean well?

Mr. HEWITT. Yes.

Senator METZENBAUM. And did you think there was any impropriety in his calling you on behalf of the candidate to affect your judgment?

Mr. HEWITT. I was a new member of the committee. I have been a member of the board of governors of the American Bar Association—my term ended last August—and I was appointed to the committee. I came on last August, and so I had only been on the committee for about 2 months, and I really wasn't very familiar with the procedures of the committee, and this was one of the first of the investigations—one of the first, certainly, of any consequence, as far as questioning in the committee that I had encountered.

I don't think that I originally thought there was anything wrong with it at all. On a couple of other occasions I had made calls myself to lawyers whom I knew in other States on other investigations, people whose names were not listed in the official report that came to the committee, but I was interested to get the points of view of friends of mine who had not been contacted.

So in this sense I guess I didn't think that it was particularly out of line, although I subsequently learned that perhaps it was somewhat unusual—but he was not in a position to exert any influence.

Senator METZENBAUM. But it was unusual for the candidate to be going around the country lobbying members of the committee.

Mr. HEWITT. I believe that it would now be my present opinion that that is unusual.

Senator METZENBAUM. Mr. Lafitte, you obviously indicated some real strength of character in turning down a Justice of the Supreme Court in arriving at your own independent conclusion, and so I am not questioning that part of it at all, but I am interested in what your opinion is as to how this other citizen of New Orleans happened to call you. Had he been contacted by Mr. Wilkinson?

Mr. **Lafitte**. I did not ask him, Senator, and I really do not know. It was a fairly short conversation. As a matter of fact, he called a law partner of mine that he knew—I did not know the individual—and said he understood that I was on the committee, and left word for me to call him. My law partner asked that I do so, and I did make the call. It was a short conversation in which he told me that he had been to school with Mr. Wilkinson and thought very highly of him both as a student and as an individual. I thanked him for the information, but, you know, I guess, frankly, I already had our report by that time, and I didn't feel it contributed much more.

Senator **Metzenbaum**. This was a pretty prominent citizen in your community who called you, wasn't it?

Mr. **Lafitte**. I think that's correct, yes, sir.

Senator **Metzenbaum**. And would you say it was a very influential member of the community?

Mr. **Lafitte**. Well, I am not sure; I would give him the benefit of that, Senator Metzenbaum. I don't know him.

Senator **Metzenbaum**. Isn't the New Orleans Times-Picayune the largest paper in New Orleans?

Mr. **Lafitte**. That's correct.

Senator **Metzenbaum**. And the man who called you was the president and publisher of that paper?

Mr. **Lafitte**. Well, I would rather that information come from someone else, Senator Metzenbaum.

Senator **Metzenbaum**. It has. [Laughter.]

Mr. **Lafitte**. I thought that it had. [Laughter.]

Senator **Metzenbaum**. I'd say that's pretty heavy pressure, or a pretty important person.

Now let's go to you, Mr. Lane. How many people called you in connection with Mr. Wilkinson's nomination?

Mr. **Lane**. You mean people that came out of the blue and tried to lobby me or call me and persuade me? No one, that I can recall. I think as to all the calls that I made, I initiated the call. Now, sometimes they are not there and they will call back, but I believe that I had previously identified those individuals that I thought I needed to hear from as to his qualifications.

Senator **Metzenbaum**. Tell me what Justice Powell said to you when he asked you that his name not be used in connection with——

Mr. **Lane**. He did not, sir.

Senator **Metzenbaum**. I thought that you had indicated that he had asked that his name not be used, and then you went back to him and asked if his name could be used. Maybe I misunderstood you.

Would you clarify that, please?

Mr. **Lane**. I would be happy to. Mr. Howard had at the very beginning of his investigation contacted Justice Powell, and at that time Justice Powell had indicated to him that he would prefer that his name not appear in our report. And it was my judgment when we were completing the report that there was a gap in it. He had close supervision over Mr. Wilkinson for 1½ years and certainly was in a position to give the committee the benefit of his evaluation. And it was only because of my concern that the committee have a complete and full report that I placed a call to Justice Powell.

Senator METZENBAUM. With whom else did you speak on the Supreme Court?

Mr. LANE. I would prefer not to answer that question.

Senator METZENBAUM. Why?

Mr. LANE. Because in any of our inquiries, anyone that I talk to, I always tell them that our report is confidential; it does not go outside the committee, it does not go to the Department of Justice, and it does not go to the candidate.

Senator METZENBAUM. Why did you call another member of the Supreme Court?

Mr. LANE. Because he had worked there for 1½ years.

Senator METZENBAUM. Well, he only worked for one Supreme Court Justice.

Mr. LANE. That is right, but there are other Justices that get to know Supreme Court clerks, and I found that out very readily.

Senator METZENBAUM. Did you call them all?

Mr. LANE. I did not

Senator METZENBAUM. How did you know that other Justices knew of Mr Wilkinson's work?

Mr. LANE. Because I read his book, I read a book that he wrote about his clerkship in the Court and his discussions with other Justices, and I therefore called some of the others on the Court.

And I might add—and I don't want to go much further—I wanted to speak to some of the more liberal members of the Court, those that have been at least labeled liberals, and get their evaluation of this individual, since they knew him.

Senator METZENBAUM. May I ask, Wasn't it the Chief Justice that you called?

Mr. LANE. No.

Senator METZENBAUM. You did not call him?

Mr. LANE. I did not.

Senator METZENBAUM. And you did not speak to him in connection with this matter at all?

Mr. LANE. I spoke to him at some point after this matter was voted on and completed.

Senator METZENBAUM. Afterwards. Mr. Buesser, you indicated that Mr. Wilkinson had very little trial experience. Now, it is my understanding that the only thing—that he had very little, very limited trial experience. As a matter of fact, the only thing that we can find that he has ever done in a courtroom is that he argued a procedural motion in the district court.

Do you know of anything else he did?

Mr. BUESSER. I do not.

Senator METZENBAUM. And you would agree that that is not really trial experience.

Mr. BUESSER. I would agree that it is very limited trial experience.

Senator METZENBAUM. Very, very limited.

Mr. BUESSER. Yes.

Senator METZENBAUM. And let me then ask you: How long have you been on this committee?

Mr. BUESSER. One year.

Senator METZENBAUM. You were made chairman when you came on; is that it?

Mr. BUESSER. Yes, sir.

Senator METZENBAUM. And how many district court judges and circuit court of appeal judges have you had occasion to pass upon during that 1 year approximately?

Mr. BUESSER. Well, I would be guessing. But I would think—of course, since the 10th of July we have passed on, I think, eight, but I don't know that that was experience that would have been relevant to my decision in this matter. But I want you to know that when I was appointed as chairman of the committee, I recognized the substantial responsibility cast upon me, and all of the records of the committee were delivered to me, and I spent a lot of time reviewing a lot of records.

Senator METZENBAUM. Good. In all of your review of all of the records, can you tell me of any other district court or circuit court of appeals judge who was recommended being qualified without having any trial experience?

Mr. BUESSER. Well, I don't know that I could find any that had as little trial experience as Harvey J. Wilkinson, but I will tell you this, that having read a number of the PDQ's—the personal data questionnaires—in which the candidate himself lists his trial experience, and having sifted through those, I can tell you that there are a number who have had very limited trial experience.

Senator METZENBAUM. Give me the names of some, if you can.

Mr. BUESSER. Well, there are Judge Posner, Judge Scalia, Judge Winner, Judge Breyer, to name four that were set forth in my correspondence of March 19 to Senator Thurmond, and, in anticipation of the fact, Senator, that such a question might be addressed to me, I have read a number of reports and, without in any sense disparaging the qualifications of current sitting judges, who I am sure long ago have forgotten any shortcomings they may have had [laughter]. There was Carolyn Dineen Randall, who was 41 years old when she was appointed to the fifth circuit, and at that time she reported that she had only litigated two substantial cases, and when asked the question as to the number of cases tried, her answer was none.

In the case of Dorothy Wright Nelson, who was appointed to the Court of Appeals for the Ninth Circuit, she had 25 years of experience when she came to the bench; under the question "Number of cases tried," she has written "None. Because of my academic commitments, I never engaged in litigation."

Senator METZENBAUM. Let me pass, Mr. Buesser, because the chairman is pressing me for time.

The CHAIRMAN. No, wait, let him go ahead. [Laughter.]

Senator METZENBAUM. OK, as long as you let me have some time when he gets done—I don't mind.

The CHAIRMAN. Well, you asked him the question, let him answer it in full.

Senator METZENBAUM. Go right ahead.

Mr. **Buesser**. Richard Possner, who was appointed to the Court of Appeals for the Seventh Circuit, was—I'm trying to read my writing here—he was an Assistant Solicitor General from 1965 to 1967, and he reported that he had argued 10 appellate cases and that he had argued 2 cases since that time, that brief period of time when he had been an Assistant Solicitor General.

Senator **Metzenbaum**. You wouldn't say that's no trial experience to argue 10 cases as an assistant to the Solicitor General of the United States.

Mr. **Buesser**. Well, Senator Metzenbaum, you made the distinction between arguing an appellate matter and trial experience. I happen to be a trial lawyer and I believe, that you learn it in the pit.

Senator **Metzenbaum**. I understand that, and I understand full well what you are saying, but Mr. Wilkinson has only argued one motion, and that one motion was before the district court, and we are talking about—when you have argued as Solicitor General nine cases, even though——

Mr. **Buesser**. Yes; I won't——

Senator **Metzenbaum**. There are good litigators you know, Mr. Buesser, who never, never try a case but spend all of their time in the appellate courts.

Mr. **Buesser**. Well, I agree with that; I don't disagree with that at all. I would be the first to tell you that I would never have found Mr. Wilkinson qualified to be a district court judge—no question about that. But I do find him qualified to be a court of appeals judge, because there you are writing appellate opinions; you have to take bodies of law and reconcile them You have two senior people, hopefully, one on each side of you, to keep you from error, and you are getting well trained and in a couple of years, as several of the learned highest judges of the land reported, he will pick this skill up in short order—there's nothing to it. I take their conclusions as being sound; they know more about being an appellate judge than I do.

Senator **Metzenbaum**. Mr. Buesser, I have to tell you that that is rather convoluted thinking to say that you can be a circuit court of appeals judge but you are not qualified to be a district court judge.

Mr. **Buesser**. Well, Senator, I wouldn't disagree with your conclusion. I think there are a lot of lawyers that would line up on your side. Obviously, four members of our committee lined up on your side. I happen to believe, though, that we ought to put on our appellate courts people with the mental horsepower to deal with the legal problems, not just people who have got the technical requirements for the seat.

Senator **Metzenbaum**. I want to ask you one more question, and then I will have some further questions for these two gentlemen when my time returns in the next 10-minute period.

I would like to ask you, Mr. Buesser, to explain to this committee what you meant when you wrote to Ed Schmults and Jonathan Rose to the following effect:

> I do want to make sure that there is not a repetition of this breach of security whereby numerous people knew specific details of confidential information shared with you which were obviously conveyed to the candidate.

I want you to explain that to me, particularly in view of the fact that you were very sensitive that we not ask you any questions as to what was contained in a letter from Mr. Howard to you, and since the candidate apparently knew, why we can't know as much as he knew about what was in your file?

Mr. BUESSER. Well, Senator, nobody regrets more than I the decision of our committee, or half of our committee, not to release that information, but I can answer fully and will answer fully what I think is the question you directed to me, and I think the answer that you want to know is: what was the confidential information that I believe was released by Messrs. Rose and Schmults? Is that not correct?

Senator METZENBAUM. That's correct.

Mr. BUESSER. All right, and I will tell you that that letter was written after careful consideration. I was sensitive and I was mad, because we do share—the chairman shares with the Justice Department—a lot of intimacies about how these things are going; to avoid serious problems, to allow candidates who are clearly not qualified to withdraw because of personal embarrassment, to allow the White House to back off on people, we have to share bad things which develop.

Now, there weren't really any bad things that developed in the Wilkinson thing. As far as I am concerned, the question was: can we find this man qualified with exactly what you point out, the limited degree of trial experience which he had.

So the thing that caused me to write that letter—and when I said that I was disturbed because confidential information had been released, it was that, first of all, there were two members of our committee who had reached diametrically opposed conclusions on the same evidence—who they were, what their votes were, and the fact that at the very moment the reports were in the mail and to be voted on. And when it came back to me that questioners, people who called several of our committee members, talked with them and revealed to them that they knew who the committee people were and what they had voted and that the vote was going on, that's when I was unhappy. That is the confidential information that I referred to.

Senator METZENBAUM. Who knew that information?

Mr. BUESSER. Well, several people who telephoned members of our committee.

Senator METZENBAUM. That includes the candidate himself?

Mr. BUESSER. No.

Senator METZENBAUM. Can you tell us who those several people were that had that information?

Mr. BUESSER. No, sir, I can't; I'm sorry, I can't, and I respectfully decline to do so. I think we have to be consistent in that I would not reveal a source that I sought and I will not chill other volunteered sources to the committee by revealing their confidences.

Senator METZENBAUM. Can you tell us which members were called?

Mr. BUESSER. Yes; I have done that in my letter.

Senator METZENBAUM. Mr. Chairman, I think in fairness I ought to give up the floor, although I do have additional questions to ask the witnesses.

The CHAIRMAN. Well, we have given you extra time

Senator METZENBAUM. I know you have, Mr. Chairman; you have been very fair.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman. Mr. Buesser, there may be one question of semantics that we might clear up here. In your letter to this committee——

Mr. BUESSER. Of what date, Senator Mathias?

Senator MATHIAS. I don't have it right before me—but the letter in which you say no votes were changed. Now, it's obvious that no votes were changed because there was only one vote taken, isn't that right?

Mr. BUESSER. Just one vote taken.

Senator MATHIAS. So what you are really saying is that no votes were influenced.

Mr. BUESSER. Well, after all, that is a subjective matter; whether or not a person's vote was influenced, I don't know. I know no votes were changed; I recorded the votes.

Senator MATHIAS. Well, there couldn't have been a change in votes. Around here if we have several votes on the same subject, if a Member of the Senate votes one way the first time and another way the second time, then he has got a change of vote.

Mr. BUESSER. The reason, Senator Mathias, that I phrased my language in those words was that there had been a lot of allegations made in the newspapers and in the Congressional Record that votes had been changed, and I wanted to make it crystal clear when I wrote that letter that there had been no votes changed.

Senator MATHIAS. Because there had only been one vote.

Mr. BUESSER. There had only been the one vote.

Senator MATHIAS. How often does the ABA appoint a second investigator in circumstances where the first investigator's report is negative?

Mr. BUESSER. Well, it's not—I guess I said in my letter it wasn't uncommon—it is not uncommon, and I was asked that question in a document delivered to me Sunday in Chicago, which I tried to respond to; and if you have before you my letter of August 6 to Senator Thurmond, you will note on page 7 thereof "The following is a list of specific instances since January 20, 1977, in which a second investigator was assigned."

Senator MATHIAS. When the first report was negative.

Mr. BUESSER. Well, no.

Senator MATHIAS. That's my question.

Mr. BUESSER. I know it is, and I can't answer that because we don't have our records kept in that way. I can only tell you that the instances listed, which, as you can see, are quite a substantial number, are those in which there was more than one member assigned.

Now, some of those—and I give you a classic example here, a gentleman well-known to you all—the last item, Charles E. Wiggins, the celebrated Congressman. There are two people assigned to him and that is simply because Mr. Wiggins had a career on the west coast in the ninth circuit, which we needed to investigate, and he had another distinguished career here in the District of Columbia, which we needed to investigate——

Senator MATHIAS. You are not suggesting he led a double life.

Mr. BUESSER. Right from the word go we put two people on that to develop it as quickly as we could, and I want to tell you it is one of the best reports I have ever read.

[Mr. Buesser and Mr. Lane consult.]

Mr. BUESSER. Mr. Lane asks me to make clear that there was no negative report on Mr. Wiggins; it is simply an example of the fact that oftentimes we assign a second or a third member for reasons other than the fact that this appears to be a difficult investigation.

Senator MATHIAS. Where the subject of the investigation has had an unusually active life or other circumstances of that sort.

Mr. BUESSER. The minute, Senator Mathias, that an investigation turns up material which causes the circuit member to feel there is going to be some negative, he doesn't want to assume the sole responsibility for making the determination, and he asks for help.

Senator MATHIAS. So you say there is not a negative report, but there are indications that negatives are likely to show up in the report?

Mr. BUESSER. Yes, exactly.

Senator MATHIAS. Let me ask first how did the Justice Department learn that there were going to be negatives showing up in this report?

Mr. BUESSER. Oh, I am sure I told them.

Senator MATHIAS. You think you told them?

Mr. BUESSER. Pardon?

Senator MATHIAS. You told them.

Mr. BUESSER. Oh, yes; I do that routinely.

Senator MATHIAS. That is this exchange which you just described in which you, as chairman, exchange confidential information with the Department

Mr. BUESSER. Yes.

Senator MATHIAS. Now, what about other members of the committee indicating to third parties that there may be negative elements to a report?

[Mr. Buesser and Mr. Lane consult.]

Mr. BUESSER. I'm sorry, I'm getting more advice than I need. Ask your question again.

Senator MATHIAS. I will be glad to yield to Mr. Lane.

What about members of the committee who are aware that negative elements are developing in a report telling third parties about those negative elements?

Mr. BUESSER. I think it would be helpful if I explain to you the way this system normally works. Normally, there wouldn't be any contact with other members of the committee unless there were very serious negatives before the report was prepared.

You must understand that we process somewhere between 40 and 50 of these investigations a year, and that all of us attempt in one way or another to make a living at the practice of law, that this does take a lot of time, and that we are very conscientious in the discharge of these things, but that, as a matter of fact, the investigation depends in large part upon the judgment of the investigating member in evaluating the material which he gets from the multiple sources, generally somewhere between 30 and 50 sources, of information, capsulizing them, listing them, evaluating them, and making a recommendation.

Senator MATHIAS. So what you are saying is that in the course of that investigation, if some negative factor had arisen, that the investigator——

Mr. BUESSER. In the Wilkinson case?

Senator MATHIAS. Well, in any case—that if a negative factor had arisen, then the investigator in running that to ground would necessarily have to raise it with those people who were being questioned about it, with the sources upon whom the investigator was depending.

Mr. BUESSER. Yes, he probably would.

Senator MATHIAS. So in that way a negative factor could be known to other people.

Mr. BUESSER. Well, it's conceivable; a serious allegation might be made against the candidate involving A, B, and C, and one might go and talk to A, B, and C about it, asking them to keep the inquiry confidential.

May I volunteer, Senator Mathias——

Senator MATHIAS. Sure.

Mr. BUESSER [continuing]. There is never any substantial negative information which the committee receives about a candidate that we don't take up personally with the candidate himself to see whether or not he can't set that to rest.

[Senator Mathias assumes the chair.]

Senator MATHIAS. At some point, were you aware that there was a more-than-average campaign under way in connection with the Wilkinson nomination?

Mr. BUESSER. You mean to influence the committee?

Senator MATHIAS. To persuade the committee.

Mr. BUESSER. To persuade the committee. I learned that only while the vote was out and in the process of being recorded, because I had telephone calls from several members of our committee reporting to me that people had telephoned them and who had indicated to them that they knew that the committee was voting, that there had been conflicting views expressed by two people, and who they were. I learned that, I would say, coincidental almost with the vote. I also received written indications of that from two members of the committee.

Senator MATHIAS. Now, without asking you to breach the confidentiality of your proceedings, were these complaints about calls from the Department of Justice or from some other Government agency, or were they from the public generally, that were the source of complaint?

Mr. BUESSER. Well, the calls that I am referring to and which I found objectionable were from members of the public. The Justice Department and I talk all the time. I mean, one day last week I talked with Dennis Mullins six times just on routine matters, and it isn't unusual for us to talk several times a day.

And it's terribly important that the chairman of this committee and the Justice Department, as Ed Schmults indicated, are in rapport and share confidences.

Senator MATHIAS. But the complaints—I'm trying to get a fix—the complaints that you received from your committee members were about calls that came in from the general public?

Mr. BUESSER. Yes, sir.

Senator MATHIAS. And that they perceived to be a kind of a campaign mounted on them.

Mr. BUESSER. Well, I don't know that any one of them perceived them to be a campaign, but when the reports were funneled into me, I perceived them to be something more than an isolated instance, and there were obviously a number of them, as set forth in my letter. That is what triggered my letter to Ed Schmults and Jon Rose.

Senator MATHIAS. Did you conclude that this was an orchestrated campaign?

Mr. BUESSER. Not really. I really didn't know; I thought that sometimes you get people, well-intentioned people, who get carried away, and I didn't hear what these people said; all I know is that several members of our committee were offended because they felt that no one should know that two people on the committee had arrived at differing results, who those people were, and that the vote was even at that moment going on.

Senator MATHIAS. You said a moment ago that you discussed all of the problems that arose in the course of a nomination with the candidate, was that correct?

Mr. BUESSER. Well, if they are serious problems, if they are problems which I think or the investigating member feels might likely result in a finding of not qualified. Very few people that get a 100-percent support.

Senator MATHIAS. Did you discuss these calls with Mr. Wilkinson?

Mr. BUESSER. No, sir; I did not. I didn't discuss the calls with Mr. Wilkinson and I didn't discuss any problems with Mr. Wilkinson because it was clear to me that whatever the problem was, it was a lack of experience, and that's a fact. There wasn't any way you could get around that.

Senator MATHIAS. What about the incident that Mr. Dunnings has described to us?

Were you aware of that before the——

Mr. BUESSER. I wasn't aware of that until after the vote had been taken.

Senator MATHIAS. Did you at any time discuss that with Mr. Wilkinson?

Mr. BUESSER. No, sir; I did not.

Senator MATHIAS. Did the committee ever discuss that episode?

Mr. BUESSER. Not that I know of. The discussions that were had with Mr. Wilkinson were had by the investigating members, Mr. Howard and Mr. Lane.

Senator MATHIAS. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you. I would like to ask you a few questions. First, let me say that my quarrel with the ABA selection committee is not as to this particular committee. It dates back to before any of you were on the committee, in their denial of the recommendation of a former superior court judge in

Arizona by the name of Nick Udall because of what I thought was most unfair reasons.

So I do not want my questions to be interpreted as any criticism of this committee's work, because I don't know how this committee works—that's why we are here.

I would like to ask some preliminary questions. How is the ABA committee appointed? By the board, the house of delegates, president of the bar?

Mr. BUESSER. Like all ABA committees, Senator, it is appointed by the president.

Senator DECONCINI. And is that ratified by the house of delegates or anything, or is that just——

Mr. BUESSER. No, sir; it is a presidential appointment.

Senator DECONCINI. And how long a term is each appointments?

Mr. BUESSER. In almost all instances, except mine, it is—appointments are for a 3-year term.

Senator DECONCINI. And how about the investigators? How are they appointed or selected?

Mr. BUESSER. We don't have any investigators; we are the investigators.

Senator DECONCINI. Who does the investigations, members of the——

Mr. BUESSER. Members of the committee.

Senator DECONCINI. Is there a subjectivity test or a process when you ask one of your members to be an investigator? Subjectivity such as if you have a nominee which you know has a certain position on some issue, do you purposely try to pick a member of your committee to do the investigation that might agree or disagree? Say the nominee has a position on quotas, would you select an investigator who might lean in that direction or not, or does that not come to your mind?

Mr. BUESSER. Well, normally, the investigator appointed is the committee member for the circuit in which the post is to be filled. However, if for some reason, such as that he has already got a couple of investigations or, as in a recent case which we had, the candidate is a member of his law firm, we would select somebody from an adjoining circuit court of appeals district.

Senator DECONCINI. So subjectivity does not play a major role? It's a matter of availability and maybe the geographic location of the nominee versus the investigator?

Mr. BUESSER. Yes, that is certainly true.

Senator DECONCINI. If I understood, you or Mr. Lane in response to Senator Mathias indicated that you don't issue reports; when you run across controversial information, you then will appoint a second investigator, thereby having two reports or two recommendations?

Mr. BUESSER. Well, we have one report, but we might have two conclusions.

Senator DECONCINI. In this case you had two reports?

Mr. BUESSER. No.

Senator DECONCINI. You had two investigators?

Mr. BUESSER. Well, no, sir; I like to think of it in terms of one investigation with one member assisting the other member.

Senator DECONCINI. You had two members doing investigation?

Mr. BUESSER. Yes, and consulting together and dividing up the people to be talked to.

Senator DECONCINI. The reason for that was because you found some negatives?

Mr. BUESSER. Yes.

Senator DECONCINI. How often does that occur, would you say, in the course of your——

Mr. BUESSER. Well, again, I refer you to pages 7 and 8 of my letter of August 6.

Senator DECONCINI. Well, I will accept that as an answer.

Do you have printed guidelines for the investigators to follow?

Mr. BUESSER. Yes, sir, we have them. They are set forth in a brochure which I think is probably well-known to you and which is entitled "American Bar Association Standing Committee on Federal Judiciary: What It Is and How It Works."

[The chairman resumes the chair.]

Senator DECONCINI. Are those the guidelines for the investigator to follow or the guidelines for the nominee to meet?

Mr. BUESSER. Well, they are the guidelines which the committee uses in forming its judgment as to what rating to give a particular candidate.

Senator DECONCINI. You don't have any guidelines or instructions as they relate specifically to the investigator, what they are to do, what procedures they are to follow other than the guidelines that you just outlined?

Mr. BUESSER. So far as I know they are not written in the formal sense that these are, but it is a well-known understanding on the committee that there will be somewhere between 30 and 50 interviews of people starting with top judges, top Federal judges, working down through the Federal system and working down through the State system, and then talking to members of the bar in various categories in the hope that we will get a reasonably accurate cross-section of opinion from the members of the bench and bar.

Senator DECONCINI. Have most of you members done investigations?

Mr. BUESSER. Oh, they have all done them.

Senator DECONCINI. Have you all done investigations? Anyone can answer. I would like to know roughly how many calls or contacts would you estimate are involved in a noncontroversial investigation, one not like Wilkinson?

Mr. BUESSER. Well, I would say during my tenure probably a minimum of 35 and a maximum of 60.

Senator DECONCINI. That would involve telephone calls and personal contacts?

Mr. BUESSER. That's right, mostly telephone calls, and each one recorded, written down and capsulized maybe in three or four lines, or it may be half a page or more.

Senator DECONCINI. Just indiscriminately, Mr. Dunnings, would you agree with that, 35 to 60 contacts in an investigation that you have done?

Mr. DUNNINGS. Yes.

Senator DECONCINI. Now, how many were involved in this one? Did you ever take time to count them up?

Mr. BUESSER. No, I never did.

Senator DeConcini. Who did the investigation of this one?

Mr. Howard. I did. My name is Howard, yes.

Senator DeConcini. Mr. Howard. How many contacts did you have in this investigation, would you estimate?

Mr. Howard. At least 45.

Senator DeConcini. Forty-five?

Mr. Howard. Yes.

Senator DeConcini. So it was not unusual, based on the average being between 30 and 60.

Mr. Howard. It wasn't unusual for me, Senator.

Senator DeConcini. Thank you. Mr. Buesser, are there safeguards built into the investigative procedures? What do you do about someone whom you make contact with or they make contact with you, and they are a disgruntled client, they don't like his golf game, or whatever reason they may have to bring about something negative to you? Besides meeting with the nominee, if you feel it's serious enough, what else do you do?

Mr. Buesser. Well, I think the greatest thing we do, Senator, is to exercise good judgment. You know, all of us are lawyers. We have all practiced law a long time. We know about disgruntled clients. We know about biased judges. We know about professional jealousy. We know about all of those things. And, hopefully, our committee people have the good sense to recognize when an opinion is given to us which is clearly slanted from some obviously personal bias or potential bias.

Senator DeConcini. Do you turn any of those names of the informants or people that you have contacted over to the Justice Department?

Mr. Buesser. Not normally, no. It would have to be a very serious kind of a thing for us to——

Senator DeConcini. If the Justice Department asks you for that information, do you do it?

Mr. Buesser. No, sir.

Senator DeConcini. You don't do it.

Mr. Buesser. I want to make it absolutely clear: The Justice Department never sees our report. All they get is our rating.

Senator DeConcini. They get your rating. But you have conferences with them and you exchange information.

Mr. Buesser. Well, if it's a particularly troublesome matter, yes, but mostly there are telephone discussions about how the investigation is going, when we think we will have it completed, that kind of thing.

Senator DeConcini. But you made some reference to getting the White House to back off or getting the Justice Department to not forward the name because of personal embarrassment. Obviously you must have some substantial discussions with the Justice Department regarding individual nominees.

Mr. Buesser. I suppose, Senator, that everyone remembers the celebrated cases that one has and likes to think that he scored great victories in every case. You don't remember that a lot of them were uncontested or default judgments or somebody backed out.

But I don't think that any of us will ever forget the unger matter, which was the subject of great concern to our committee and which we met about with the Justice Department a number of times. I met with Ed Schmults and with Fred Fielding, and my predecessor, Brooksley Born met many times more than I did on that same matter. That is something we will never forget, and I hope we never have another one like it.

Senator DeConcini. Thank you. Let me ask you one last question, Mr. Chairman.

What appeal or process does a nominee, potential nominee, go through when he wants to object or he feels that he didn't get a fair shake from the committee? Can he ask for a hearing before the full committee and appeal it to the Board or anybody else?

Mr. Buesser. Well, I think we have always accorded candidates who are unhappy an opportunity to meet with us, to be confronted with our objections, and to deal with them.

Senator DeConcini. Would that be with the full committee?

Mr. Buesser. No, sir, just with the——

Senator DeConcini. Just with the investigator?

Mr Buesser. Yes, sir.

Senator DeConcini. And do they have an opportunity to meet with the full committee if they ask to do so?

Mr Buesser. Well, I suppose if somebody asks, they would, but generally by that point the issues are pretty clearly drawn, and, we don't object to somebody because of the way he parts his hair or his politics or his political philosophy.

Senator DeConcini. You used to object to them because they were 63 or 64 years old.

Mr. Buesser. Well, since I became chairman, we don't do that anymore.

Senator DeConcini. That no longer is a criterion, is that correct?

Mr. Buesser. No, sir.

Senator DeConcini. Well, I will submit some questions, Mr. Chairman, regarding the age question which I would like clarified for the record.

Thank you.

The Chairman. The distinguished Senator from North Carolina, Mr. East.

Senator East. Thank you, Mr. Chairman. First, if I might be excused from asking a great deal of questions to make a few observations, since so many questions have already been pursued that would answer questions that I might have.

First, Mr. Chairman, if I might back off here and take a little broader perspective on this, we have had this hearing as a part of the unanimous-consent agreement of the U.S. Senate. But I think that we are setting a very bad precedent here. Now, initially you had agreed, which I think was very proper, to have general hearings on how the ABA conducts its investigations. But to tie it in with a particular nominee, I think, sets a bad precedent, though I know it was done in order to expedite the political process on the Senate floor.

What we have done is to put these gentlemen in the docket, and I think it's improper, because it means henceforth with any nominee that this committee is asked to look at, and be their report favorable or unfavorable, they will be asked to come, asked publicly how they voted, why they voted, who they talked to, and if they were, quote, "influenced" thereby.

The CHAIRMAN. Senator, I am glad you raised that point. I might mention that we had planned to have the ABA members before this committee anyway; there had been a request—I had promised to have them. But I didn't plan to have them until later, after these nominations were behind us.

However, in an agreement to get this matter to a vote in the Senate, we agreed to call them before us at the request of Senators, and——

Senator EAST. I understand that.

The CHAIRMAN. Let me get through now—at the request of Senator Kennedy and Senator Mathias and Senator Specter. And as long as they are here, I thought it would be a good chance just to ask them about their procedures, and that would save them from coming back another trip. It was not my intention at all—in fact, I wanted to keep it separate—but, as long as they are here, we felt we would just ask them about their procedures and save them a trip back.

This will not set any precedent that they will be called back in nominations. They have already come today, they have told us their procedure, and, so far as I am concerned, that ends it. They will not be called back for other nominations in the future so far as I am concerned.

Senator EAST. Well, I appreciate that, Mr. Chairman, and I am glad to hear that, but, on the other hand, the fact remains as a matter of record that is what we have done, and I simply would like the record to show, then—and I appreciate the chairman clarifying it—this is not a precedent and will not happen again.

The CHAIRMAN. I thought it was improper to even have to take them both at one time, but in order to get this matter expedited in the Senate—we are deadlocked—we agreed to give this extra day of hearings, but I do think it would have been better if we had had them separate; I don't think we ought to ask these gentlemen to come in and tell how they voted. If you noticed, today I didn't ask them, unless they wanted to volunteer—how they voted, why they voted, who they communicated with, who they talked to. They have got a right to talk to anybody they please where they can get information that will throw light on the subject, because I am sure that anybody that can furnish information that would help them in making their decision, they are glad to receive it. They don't have to accept it. Just like the gentleman here speaking about Justice Powell—he voted the other way, he didn't change his vote, and so it didn't affect him. I asked every one of them today if any improper influence was used upon them by anybody at any time or attempts to use it to influence their vote—they all said no.

But I am in accord with your thinking on this question, and I hope this will be the last time that they will be asked to come before this committee. And since they have explained their procedures today, it will not be my intention to ask them to come before us again and tell us how, why, or other facts about any particular case. All they do is make a recommendation which we can follow or not follow, but we appreciate the time they give to it, we appreciate the help they give us, and we thank them for it—we thank them for coming today.

Senator East. Well, I appreciate the chairman's comments. He and I are in complete agreement. I appreciate his clarifying the record.

I would simply like to reemphasize that the American Bar Association is a professional organization. It does not promote candidates for appointment; it is not a political organization promoting particular candidates or causes; it is solely a professional organization.

But I fear that we are subtly pulling the ABA into the political processes of the legislative body. And I wouldn't be surprised if they went back, as a professional organization, and began to rethink whether they want to be a part of this. Because, in spite of the very eloquent and fine clarifications of the chairman, which I appreciate, we have put these gentlemen in the docket, I simply want the record to show that I think it's improper, even though it was done to politically expedite the matter on the floor of the U.S. Senate.

But I suspect in the future that they will begin to reflect to themselves: "We are a nonpolitical, professional organization, and if we are going to be drawn into the process in this way, we shall henceforth no longer make our services available."

Now, I think it's one thing to have hearings to ask them what their general procedures are; I think it's another to come here and to ask them how they voted on a particular candidate, who called them, and whether they were, quote, "influenced" thereby. I think what you should properly say, to anyone asking whether you are improperly influenced: well, of course you would be influenced—that's why you get information, positive and negative. Naturally, it would affect your opinion. The point is whether you are improperly influenced. Are you bribed? Are you bargained with? Are you told that a case will be decided in your particular way if you do this or that? That is improper influence.

But naturally they would be influenced. Otherwise, what's the use of communicating with anybody? What's the use of gathering any data?

I think that what we have to look at is, having asked for your opinion, you come back and you say your vote was 10 to 4—that's a winner in anybody's language, certainly in political language it is.

And I think that when the ABA comes back to us with a 10 to 4 favorable vote, the substantial majority indicating he is qualified—if we are going to start looking behind it in every case, as to how each member voted, who he talked to, whether they, quote, "influenced" him or not, then I think that we have politicized this group and that they are not going to want to assist us any longer. Neither by law, nor under the Constitution, are they required to, and, I think, as a professional organization, they will not desire to do that.

And I would respect them for not wanting to do that.

Let me, having said that, move on to several quick other points here.

The Chairman. Well, Senator, I think I made it plain that this is no precedent, it is an unusual situation, I am in accord with your thinking, and it shall not be my intention to have them come back again, as the main reason for bringing them here to start with is because some of the members wanted to find out their procedures. And today they are here, they have given their procedures, that suffices, and I hope it won't be necessary to ask them to come back any more.

Senator East. And I shall cease and desist on that particular subject, and if you would allow me to make two or three additional observations totally unrelated to that, because I think we have exhausted that subject.

On the qualifications of the nominee, which I think should be of primary concern, I am slightly troubled again with the implication that because—I would like unanimous consent for a little extended time of a minute or two since I yielded to the chairman.

The Chairman. You may proceed—that's correct.

Senator East. And others have gone on slightly beyond their appointed time.

The Chairman. That's correct.

Senator East. I would like to suggest that, as I understood the whole ABA process here, though trial experience would be valuable, there are other compensating factors which can outweigh it. In Professor Wilkinson's case that was so, in terms of his academic credentials, his academic background, and his teaching experience in the areas of Federal courts, criminal procedure, and constitutional law.

It reminds me a little bit of what Richard Hofstadter, a Columbia University historian, wrote in a book called "Anti-Intellectualism in American Life." It is somewhat like the comment that we hear from businessmen: "if you have never met a budget, you don't know how to run the government." And having been a licensed attorney and practiced law and then having earned a Ph.D in political science and taught that subject for 16 years, I have seen a little bit of both sides of this thing. I do not agree with the notion that only, quote, "practical experience" is the best thing. As I noted earlier this morning, sometimes it can narrow one's perspective inadvertently, but it can narrow it.

Now, as Mr. Buesser has said, on the court of appeals, let alone the U.S. Supreme Court, I think that the breadth of the law, in terms of trying to bring together history and constitutional precedent, that this blending takes a mind of keen intellect. That is not to say that this is superior to the intelligent trial lawyer; it is to say it is a different kind of quality

And in our highly specialized world, you cannot be all of these things at one time. And I think that's true in the case of Mr. Wilkinson.

Clearly, the ABA committee, I gather, thought that these academic credentials were of such an overwhelmingly high quality that they offset the lack of trial experience.

Again, I note that Professor Wilkinson taught courses of a procedural trial nature—Federal courts, including these subjects: cases or controversies, Federal questions, jurisdiction, implied remedies and rights of action, Federal common law, abstention, adequate independent State grounds, section 1983, and Federal habeas corpus. Then he also taught criminal procedure.

Now I would dare say not many practicing attorneys would maybe want to match wits with Mr. Wilkinson on Federal procedure of a criminal nature.

So I think the improper influence thing has been clearly disposed of, and I think that all that remained was this matter of trial experience, and I think, as the ABA committee itself has said, we must finally, to use that trite, hackneyed phrase, take the bottom line: 10 to 4, a substantial majority of the ABA committee says that Mr. Wilkinson is qualified.

And they found that these other factors were overwhelmingly positive. I think they are correct on that in terms of the court of appeals. And that would also, I might note, include the U.S. Supreme Court. I would rather have a man of Professor Wilkinson's credentials serving on the U.S. Supreme Court than a man who had been a trial attorney, strictly at the trial level, dealing exclusively with criminal law, and who had done nothing else for 30 years, because I think he would bring that breadth, that largeness of mind, as Solomon might have put it, as Oliver Wendell Holmes put it—"law in the grand manner."

And at some point you need that, and you get it in good law teaching. Your first-rate law schools are made up of those kinds of teachers, and everybody knows that.

So I think this is a red herring on the trial experience. I don't mean that it's been dragged in that way. I am trying to put it in perspective, having personally seen both sides. I don't see any weakness there; there are so many positives for court-of-appeals-level work that, again, I am awestruck that we should even be debating the qualifications of this gentleman, having disposed of the allegation that there was undue influence.

I think my time is up, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts, Mr. Kennedy.

STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. Thank you very much, Mr. Chairman. I regret very much that I was unable to be here earlier in the course of these hearings, but due to the death of a longtime friend of myself and the members of our family, the former chairman of the Labor Committee of the House of Representatives, Carl Perkins of Kentucky, I was necessarily absent earlier this morning.

I appreciate very much the courtesies you have provided, Mr. Chairman, to Carolyn Osolinik, opportunity to inquire of witnesses that we had this morning. And I appreciate the opportunity to participate in the hearing during the course of this afternoon.

I want to join in expressing a word of welcome to the members of the Bar Association, their presence here today to help this committee. I think I want to mention, as a former chairman of this committee, how much I think that they have contributed over the period of years to improving the quality of the judges, Federal district judges, and also in the circuit court and the Supreme Court of the United States. I had the good opportunity to work with the members of the Bar Association during the time when we had a number of appointments to the courts in the Federal judiciary, and found that their help and their assistance was invaluable, both to this Judiciary committee, to me personally, and I think all of us who are concerned about the quality of justice in this country realize the important role that they play and of the very significant role that they play for this committee.

So I want to express my appreciation to all of them for joining with us today and inconveniencing themselves and being available to us. I suppose it is out of the very respect for the process that I, for one, have been very troubled by the situation which appears to me that we have before us, an unusual instance in which the ABA process of impartial and independent review may have been irreparably compromised by the Department of Justice and by a potential nominee for the judicial office.

We have had some new materials bearing on this question, which have been supplied to the committee in the past day by Mr. Wilkinson, by the Justice Department, and by the ABA, and these materials convey the clear impression that in the 4- or 5-day period between November 3 and 7, 1983, leading up to the critical ABA vote on the nominee, that Mr. Wilkinson and Mr. Schmults and Mr. Rose of the Justice Department planned and implemented an intense and perhaps unprecedented lobbying campaign to override the negative recommendation of Mr. Howard and to ensure a rating of qualified for Mr. Wilkinson.

So I welcome the opportunity to help clarify these issues with the witnesses that are here. I share the disappointment that Mr. Powell has declined the committee's invitation to testify, especially in light of this morning's revelation that the Justice Department was in communication with Mr. Powell to urge his help shortly before the ABA, and I look forward to the testimony of this afternoon

I would like to ask of Mr. Buesser—as I understand, you indicated in your report to the committee that none of the reports of your committee are shared with anyone, including the Department of Justice, because of the pledge of absolute confidentiality to the sources for these reports, is that correct?

Mr. **Buesser**. That is correct, sir.

Senator **Kennedy**. And over the period of time, have you, to your own knowledge, seen any other instances where there has been the series of contacts which have been made in this particular case for any other Federal district court judge or circuit court judge?

Mr. **Buesser**. No, sir; I know of none.

Senator **Kennedy**. So in that instance this has at least some precedence in terms of your own observation of the process; is that correct?

Mr. **Buesser**. Well, I don't know whether it's a precedent or not; it could have been a series of remarkable coincidences—but I think that unlikely.

Senator **Kennedy**. Well, were you aware that Mr. Wilkinson himself was helping to organize the lobbying campaign?

Mr. **Buesser**. No, sir, I was not.

Senator **Kennedy**. Were you aware that Mr. Wilkinson approached a black student at the University of Virginia Law School to help him by contacting the black member of your committee?

Mr. Buesser. I learned that only through conversations with my colleague, Stewart Dunnings of Lansing, and also newspaper accounts

Senator Kennedy. Do you feel that was proper?

Mr. Buesser. Well, I think that any member of the public has the right to attempt to discuss or to attempt to influence, for that matter, a member of our committee. We in the normal course of events, as I have already testified, would normally welcome the input from people—we seek it originally from sources that we select, and we would be in a poor position to decline to receive information which is offered gratuitously to us.

Senator Kennedy. Is that really what we are talking about here? Are we talking about any member of the public or are we talking about a nominee for the circuit court, for the fourth circuit?

Mr. Buesser. I am speaking about a member of the public expressing an opinion.

Senator Kennedy. Well, I am talking about Mr. Wilkinson, if I can get back to my question. I had asked earlier about whether you knew that Mr. Wilkinson was helping to organize a lobbying campaign. You had indicated a negative response to that.

Mr. Buesser. And that is correct—I did not know that. If indeed that was so.

Senator Kennedy. All right, so you were not aware till your conversations with Mr. Dunnings that Mr. Wilkinson had approached a black student at University of Virginia Law School to help him by contacting the black member of your committee.

Mr. Buesser. I did not know that.

Senator Kennedy. Well, now that you do know, do you consider that a proper contact or an improper contact?

Mr. Buesser. I think it was unwise.

Senator Kennedy. Well, are we fencing for words, or are we——

Mr. Buesser. No, we are not fencing for words, Senator, nor will I allow you to put words in my mouth.

Senator Kennedy. So it's unwise but proper?

Mr. Buesser. No, I didn't say that. But I think the characterization of my opinion is a matter that is personal to me.

Senator Kennedy. And you would call it unwise.

Mr. Buesser. Yes.

Senator Kennedy. Do you know whether this student was a student at the time of Mr Wilkinson?

Mr. Buesser. I don't know that.

Senator Kennedy. Would that make a difference, in your opinion?

Mr. Buesser. Well, I suppose there are many factors that would. I think it would make a difference; I think it would make a difference if Mr. Wilkinson prevailed upon a current student to attempt to exert influence on his behalf

Senator Kennedy. What sort of difference would it make?

Mr. Buesser. Well, I think it would reflect more unfavorably on that effort by Mr. Wilkinson.

Senator Kennedy. Do you know whether he contacted any other students that were either taking courses from him or had taken courses from him?

Mr. BUESSER. Well, the answer to your question is no, qualified only by the fact that there were a number of members of our committee who were contacted by various people, and I am not satisfied that I am sufficiently advised as to the identities of those people to identify them.

Senator KENNEDY. Did anything strike, when you reviewed this particular file, about the number of contacts that were made after materials—or after you gave certain information to the Department of Justice, did there seem to be any—did you form any impression whether there was a pattern or a proliferation of calls or contacts or a flurry of activity after the Justice Department was notified as to the views of the bar association?

Mr. BUESSER. Well, I think the answer to that, Senator, is yes. I have already testified at length with reference to that. I have indicated that I was concerned, as evidenced by my letter. As a matter of fact, I was unhappy that this occurred and that these calls occurred at the time that the committee was in the process of voting.

Senator KENNEDY. So we are not really talking what you mentioned before about just a general public commentary to members of the bar association, with general kind of information. What we are talking about is—I will use these words—a lobbying effort. We might use some other word; if you want to use another word, that would be fine with me, too.

What kind of effort would you call it?

Mr. BUESSER. Well, I suppose it was an attempt to influence the vote or judgment of the various members of the committee, or perhaps, on the other hand—that's my conclusion—perhaps it was simply an offer, a hope that information unknown to that committee member could be conveyed which would be helpful to him in making a decision.

Senator KENNEDY. Mr. Dunnings, why did you feel that Mr. Wilkinson was not qualified?

Mr. DUNNINGS. Because of his, in my opinion, total lack of trial experience. I am aware of the fact that he argued one motion in the district court, which I thought was entirely meaningless in trying to come to any conclusion as to his trial experience. Also his admission to the bar did not comply with our rules, where we have announced that they should have at least 12 years.

Now, we in the past, of course, have waived that, when you have an affirmative action candidate—and certainly he did not fall within that category. And in addition to that, Mr. Howard, whom I greatly respect, in his report had indicated another element that I gave some consideration to with regards to lack of compassion.

Those are the reasons why I voted that he was not qualified.

Senator KENNEDY. What was that element? What was the other element that you mentioned here?

Mr. DUNNINGS. Lack of compassion.

Senator KENNEDY. Have you talked about that during the course of these——

Mr. DUNNINGS. No.

Senator KENNEDY. Can you elaborate on that?

Mr. DUNNINGS. Well, I relied upon Mr. Howard's judgment, who had an opportunity to interview the candidate. I had not.

Senator KENNEDY. That was, at least in your review of the report that Mr. Howard had provided—you drew that conclusion from reviewing the report?

Mr. DUNNINGS. That's correct

Senator KENNEDY. And that influenced your decision?

Mr. DUNNINGS. Along with the total lack of trial experience and the fact that he had not been admitted to the bar for a period of 10 years prior to the date that we voted.

Senator KENNEDY. Can you tell us what, if anything, was in that report that either led you to the conclusion that Mr. Howard drew that there was a lack of compassion?

Mr. DUNNINGS. Well, I guess it had to do somewhat with his arrogance in part. I really have not reviewed the report and I really cannot recall all of the particulars, but that is what comes to my mind at this time

Senator KENNEDY. Did you form any opinion whether Mr. Howard was mildly against Mr. Wilkinson or strongly against him?

Mr. DUNNINGS. Well, I can say this, there was no question in my mind that he was opposed to him. Now, if you want to say that's strong or mild, I don't know whether I can put that characterization on it—but there was no question in my mind that he felt that he was unqualified, not qualified.

Senator KENNEDY. Do you think anyone reviewing this report in and of itself would draw that conclusion?

Mr. DUNNINGS. At least I drew that conclusion; I don't think anyone else would have any difficulty.

The CHAIRMAN. Senator, your time is up. Do you want us to come back to you?

Senator KENNEDY. Please, I would like to come back.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman. Mr. Buesser, before coming to the specific case here, there are two procedures at least which arise in my mind which might be important to focus on for future reference, and, at least speaking for myself, I think a very important part, perhaps the most important part, of this hearing is the future of the ABA procedures in terms of improvements that might be made.

It appears that the 14 members who voted had varying degrees of information. For example, Mr. Dunnings had the telephone call which he has referred to, and without characterizing it as good, bad, or indifferent, certainly it is at least a relevant factor. And it seems to me that it would be useful if the ABA committee would adopt a procedure whereby there would be some way, perhaps by designating one principal investigator for each potential nominee or however you might choose, so that every bit of information which comes to any 1 of the 14 is referred to some central point and then disseminated to everyone else, because, as you have said, Mr Buesser, you didn't know about what had been said to Mr. Dunnings by the student who had called.

Would you agree that it would be useful to make a modification so that all information which comes to any one member is properly disseminated? Like members of a jury shouldn't all ABA committee members have the same factual basis for coming to a judgment?

Mr. BUESSER. I would agree, Senator Specter, that that certainly would be desirable. I do point out that if there were, as Mr. Howard says, 45 interviews, pieces of information, in this case, the 46th was, if not de minimis, at least not significant.

But I do agree that it would be desirable for everyone to get this information, and in the ordinary course of our operations they would. You have to remember that this particular information that came to Mr. Dunnings—this person who called and discussed this matter, was at the very time that the vote was going on. And there has to be, as in all legal proceedings, a time when you have a cutoff.

Senator SPECTER. Mr. Buesser, you were on notice that a lot was happening in this case. There was specific reason to conclude that things were occurring which might well have been called to the attention of some members.

I don't want to belabor the point; I just make that recommendation to you.

Mr. BUESSER. Let me tell you, I agree that every piece of information which is furnished to us ought to be supplied to all committee members, and I am sure that our committee will make an effort to do that in any future case where this kind of situation arises.

Senator SPECTER. The other recommendation which I would like to make, speaking for myself again, before coming to this specific case, is to have a specific standard, in writing, on the circumstances under which you appoint a second investigator.

As I distill the totality of today's testimony, there is no precise standard which is reduced to writing, where, for example, you would move from Mr. Howard to Mr. Lane on a single potential nominee. And it seems to me that to regularize that into a standard operating procedure would be enormously helpful.

Mr. BUESSER. I think we could do that.

Senator SPECTER. All right, let me come to the specific case here in the brief amount of time which I have. As I wrote down your comments, you said that you would never find Professor Wilkinson qualified to be a district court judge.

Was that your statement?

Mr. BUESSER. That was my statement.

Senator SPECTER. Well, I, for one, find it surprising, Mr. Buesser, that that would be the case. I can understand some variations in standards, but it seems to me surprising that the chairman of this committee would make that flatout statement that a man or woman is qualified to be a circuit judge but not a district court judge.

Mr. BUESSER. Senator Specter, I understand your surprise. There might have been a time when I would have been surprised by that, but I can tell you that I am in good company. That same opinion has been expressed by a great many of the lawyers and the judges that we talked to in this case.

Senator SPECTER. Well, I would respectfully request that you put the item on your agenda for full committee consideration, because I find it to be an inappropriate standard, again just speaking for myself and as a lawyer of quite a few years.

Mr. BUESSER. I understand. I know that you are in good company, too.

Senator SPECTER. Well, just a suggestion that you might want to rethink that.

Mr. Buesser, going back to your letter of November 22, 1983, when you wrote Mr. Schmults and Mr. Rose, the clear thrust of this letter, without taking the time to read it, is that several members felt there had been a breach of confidentiality and that the personal calls made on the nominee's behalf at the time of a vote was in bad taste, counterproductive.

Did you consider Mr. Schmults and Mr. Rose responsible for this series of calls?

It certainly looks, from the tone of the letter, as if you are saying: "You have breached the confidence, these calls are coming forward." The finger is being pointed in that direction.

Do I err in that inference?

Mr. BUESSER. I am not backing away from the statements in that letter a bit. What I was particularly offended about, as I believe I have previously stated, was the fact that a number of these calls that we got, and certainly a couple of the letters that we got from committee members, made reference to the fact that the callers knew that there had been a divergent view expressed by the two committee people, what those views were, who had stated them, and that we were even then in the process of voting.

That was the confidential information that I had shared with the Justice Department that I felt had been—must have, through them, been somehow or other conveyed to the people who made the calls to my committee members.

Senator SPECTER. So you thought the breach had come through the Justice Department, and you really were critical of them for the consequence—if not perhaps their orchestrating—but at least the consequence of having all these calls made in bad taste at a bad time.

Mr. BUESSER. Yes, sir.

Senator SPECTER. Mr. Buesser, you have been asked a question about the identity of these people who called, and you have declined to make disclosure of that. I would ask you to reconsider that on the ground that people who gain information as a result of a breach of your confidence and who then take the initiative in calling members of the ABA panel are in a quite different category from people whom you call and seek information from, category 1; or even, category 2, people who call you under circumstances where anyone has a right to make a statement to you. I would suggest, moreover, that where, as you have put in writing, these calls were the result of a breach of confidence and apparently orchestrated, that such callers are really not entitled to that kind of confidentiality; that they are really gratuitous volunteers of the first and worst sort.

I don't know that you would say it is part of a—well, joint action, never mind conspiracy. But why are they entitled to any protection as to confidentiality?

Mr. BUESSER. Well, Senator, I think the chain of evidence is broken down. It may be that they got this information because of a breach of confidence, but it doesn't necessarily mean that they knew that. And they were supplying information which they believed they were supplying in good faith.

And I am unwilling to draw the conclusion that mala fides, if any, attaches to the people who ultimately were the instruments and made the telephone calls.

Senator SPECTER. Well, there are a lot of legal doctrines which certainly establish the distinction—root of the poisonous tree, or responsibility for the source, or a strong inference of a part of an organized campaign. It seems to me that such considerations would undercut any claim of confidentiality. It's something this committee does: You have decided that as a matter of your practice that you need to have confidentiality to carry on your investigation.

But I would suggest to you that your confidentiality rule doesn't go to this extent. Unfortunately, we are under a very hurried procedure, and you are not going to have time to consult with your committee or to reflect on it.

But I would suggest to you that there is a very significant distinction which would augur against the confidentiality here.

Mr. BUESSER. Well, let me tell you, Senator, that I understand your feeling, and I have considered it, our committee here has considered it carefully, and we intend to take it up with our full committee at the earliest possible moment.

But at this point in time, I wouldn't feel that I could release that information.

Senator SPECTER. I have one final question, Mr. Chairman, if I might ask Mr. Hewitt—it's a brief one.

Mr. Hewitt, it's come to my attention that you were quoted as having said that you would "bend the rules" and vote to rate Wilkinson qualified because of the calls and recommendations of Chief Justice Burger and Justice Powell which had convinced you to do that. I am not saying that they had called you, but it may be that their calls had been called to your attention.

And I ask this question to put all the cards face up as to whether Chief Justice Burger had supplied information on Professor Wilkinson.

Mr. HEWITT. To the best of my knowledge, he has not, and I have no recollection of that quotation at all, and I am not sure that I really feel that way.

Senator SPECTER. You never had any knowledge of any recommendation from the Chief Justice on Professor Wilkinson?

Mr. HEWITT. I really don't remember whether the Chief Justice had been approached by either Mr. Howard or Mr. Lane. I had no information when I made my vote except the report which was sent out by Mr. Buesser to all members of the committee and the call from Professor Perlman about which I have previously testified.

Senator SPECTER. Had you heard at any time about a recommendation by Chief Justice Burger as to Professor Wilkinson?

Mr. HEWITT. I don't have any recollection of ever having heard, either prior to or subsequent to my vote.

Senator SPECTER. Mr. Chairman, would you like me to ask Senator Hatch's questions?

The CHAIRMAN. I think he wanted them asked.

Senator SPECTER. I have been asked to ask Mr. Dunnings this question from Senator Hatch, who could not be here—he is otherwise engaged.

Mr. Dunnings, Senator Hatch wanted a reference made to a Washington Post article on May 27, 1984, where there is a discussion of a conversation between Mr. Melvin Hollowell and Mr. Stewart J. Dunnings, Jr., member of the American Bar Association Judicial Selection Committee, and according to the Post there was a discussion of less than 10 minutes on the subject of Professor Wilkinson's nomination.

And the first thing that Mr. Dunnings said to Mr. Hollowell, according to this report, was "What's he going to do for black people?" and Senator Hatch's question is whether that statement was made, and, if so, what the comment referred to

Mr. DUNNINGS. The gentleman in giving that quote to the Washington Post made a mistake; I absolutely deny that I have ever at any time, in questioning any person with regards to a position of a prospective nominee, as to what he is going to do for black people. I have always asked what is that person's attitude toward minorities and females, in some form. I have never asked, never, what can you do for a black person.

Senator SPECTER. So, simply stated, it's a misquotation.

Mr. DUNNINGS. It's a misquotation.

Senator SPECTER. Thank you, Mr. Dunnings; thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Howard, when you were making an evaluation of Mr. Wilkinson, were you aware of the fact of Mr. Wilkinson's involvement in a matter on behalf of the Justice Department, which resulted in sanctions against the United States for failure to file answers to interrogatories in the *Baylor University* case?

Mr. HOWARD. I was advised by someone else with whom I had contact that there was a threat of sanctions or some criticism by the court that was handling the matter.

Senator METZENBAUM. Well, were you advised, according to the information I have, that Mr. Wilkinson was responsible for answering interrogatories in the *Baylor University* case and, as a consequence, the Government failed to respond on time, and that this resulted in sanctions—not very much money—against the United States for this delay, and, as I understand it, that's the only time that that has happened in the Civil Rights Division in the past few years.

Did that information come to your attention?

Mr. HOWARD. It came to my attention, Senator, except for the sanctions. I had no knowledge of any sanctions.

Senator METZENBAUM. Thank you, Mr. Howard. Mr. Lane, did you talk to Mr. Wilkinson or any member of his family at any time after his name was submitted to the ABA?

Mr. LANE. Oh, yes, Senator. I did not speak to any members of his family, but I spoke at length with Professor Wilkinson when I visited him, together with Mr. Howard, at the University of Virginia Law School, when we interviewed him toward the close of our investigation.

Senator METZENBAUM. About when was that?

Mr. LANE. It was some time in October—it's either early October or late September. I would have to go back and look at some notes I had. I could probably place that.

Senator METZENBAUM. That's all right, that's close enough. And, as a matter of fact, you and Mr. Howard sent a letter to the chairman enclosing a formal report with John Lane's additional interviews attached, indicating that Howard finds the candidate not qualified and that Lane disagrees.

Is that correct, on November 4?

Mr. LANE. That was Mr. Howard's letter to the chairman.

Senator METZENBAUM. As of November 4. Let me ask: How long have you been a member of this bar association committee?

Mr. LANE. I have been a member for approximately 1 year; I was appointed about this time last year.

Senator METZENBAUM. And you have been a member of the bar for how long?

Mr. LANE. Since 1948.

Senator METZENBAUM. Active in your local bar association?

Mr. LANE. Yes, sir.

Senator METZENBAUM. In what position?

Mr. LANE. Oh, I've chaired committees, and have been a member of and chaired other American Bar Association committees.

Senator METZENBAUM. Generally speaking, do you think it appropriate that a nominee, as Mr. Wilkinson was in this case, or any other nominee, is fit to wear the judicial robes if in order to get confirmed or approved by a body such as this, or by the U.S. Government appointing authority, that is, the administration, goes out and lobbies to get that approval? Do you think that's the right thing to do?

Mr. LANE. Well, I agree with our chairman, in answer to Senator Kennedy's question, he concluded that it was quite unwise.

Senator METZENBAUM. Let me ask you this question. On November 4, the report gets in to Mr. Buesser. Now, I have before me here the telephone list of Mr. J. Harvie Wilkinson, and starting back on October 23, he made one call—going each day, one call, one call, two calls, one call, two calls, one call, one call, one call, one call, two calls. Now, the report hits on November 4. On November 5, which is a Saturday, Mr. Wilkinson makes 21 calls, and, not by surprise, almost every one of them are into areas where there are members of the bar association committee. On Sunday, he continues that same procedure, makes 11 calls; on Monday he makes 12 calls, and so on—Tuesday he makes 3, Wednesday he makes 13. And almost with no exception, except for some calls into Richmond—but other than that, almost all of them are into areas—New Orleans, Philadelphia, Birmingham, Alabama, Colorado, and just by coincidence, when you put that up against a list of where the members of the committee live, that is where they live.

Now, if you had known that Mr. Wilkinson was the kind of person who would learn that there was a negative report or a report that at least was partially negative concerning his bar association rating—if he was the kind of person that then picked up the phone and started lobbying all of the members of the bar association committee—I am not asking you if you would have arrived at a different conclusion, but might you have arrived at a different conclusion?

Mr. LANE. I think it would be a factor that would have to be taken into account.

Senator METZENBAUM. Thank you, Mr Lane. Well, Senator Kennedy raises the question positive or negative, but I guess by implication certainly negative.

Mr. LANE. It would certainly not help the candidate in the eyes of this member of the committee.

Senator METZENBAUM. Now, did you ask Justice Powell if he knew anybody on the ABA committee?

Mr. LANE. To the best of my recollection, I did not, Senator.

Senator METZENBAUM. Did he tell you he knew Gene Lafitte?

Mr. LANE. He did not.

Senator METZENBAUM. You don't remember discussing Gene Lafitte with Justice Powell?

Mr. LANE. No, I do not.

Senator METZENBAUM. Did you tell Justice Powell the date when the ABA vote would be taken?

Mr. LANE. Oh, no, of course not. When I called Justice Powell, it was prior to the time we completed our report, and there would be no vote until the report is completed and sent out to the chairman and then distributed to the committee members.

Senator METZENBAUM. Other than Mr. Buesser, did you say to anybody else that Mr. Wilkinson's nomination might be in trouble with the committee?

Mr. LANE. Well, I probably never told anyone that the nomination was in trouble, but I would think that one could gather from the kinds of questions I asked about age, experience, trial experience, and things like that, that there were questions, and serious questions, being raised about the qualifications of this nominee.

Senator METZENBAUM. Well, let me ask you a question. In view of the extensive lobbying that Mr. Wilkinson did—and I told you of the telephone calls, we know he called Mr. Mark Wolfe, deputy U.S. attorney for Massachusetts Mr. Charles Ames, a partner at Hill & Barlow in Austin—and I guess Mr. John Harrington—is Mr. John Harrington a member of your committee?

Mr. LANE. Yes, sir.

Senator METZENBAUM. Apparently those men had called Mr. John Harrington at Mr. Wilkinson's request, as I understand it. Mr. Paul Bator, Deputy Solicitor General; Mr. Robert Fiske of the second circuit—is Mr. Fiske a member of the committee?

Mr. LANE. Yes; he is.

Senator METZENBAUM. Mr. Ashton Phelps, president and publisher of the New Orleans Times-Picayune, and Mr. Gene Lafitte of the fifth circuit—and we know that Mr. Lafitte is a member of your committee. Mr. Melvin Hollowell at the University of Virginia Law School, he called Mr. Stewart Dunnings—and Mr. Dunnings has already testified. David Locke, a partner of Foley & Lardiner in Milwaukee, to Steven Kean of the seventh circuit. Mr. Harvey Perlman, dean of the University of Nebraska College of Law to Mr. James Hewitt—we have already had that evidence. Mr. Lawrence Hammond, a partner in Martori, Meyer, Hendricks & Victor in Phoenix; Prof. Paul Mishkin of the University of California Law

School, California School of Law at Berkeley, to Mr. John Gavin and Mr. Victor Chavez in the ninth circuit—both Mr. Gavin and Mr. Chavez are members of your committee?

Mr. LANE. Yes, sir.

Senator METZENBAUM. And Mr. Jack Sperling, a partner at Fairfield & Woods in Denver, and Mr. Waller Horsby, immediate past president of the Virginia State Bar to Mr. John Pfeiffer of the tenth circuit—and Mr. Pfeiffer is a member of your committee?

Mr. LANE. Yes, sir.

Senator METZENBAUM. Mr. George Lynn, a partner in Maynard, Cooper, Firestone & Galen, and Mr. Gibson Harris, a partner in McGuire, Woods & Battle in Richmond and Birmingham, and a past president of the Virginia Bar Association, calls to Mr. Roland Nachman, eleventh circuit. Is Mr. Nachman a member of your committee?

Mr LANE. Yes, sir.

Senator METZENBAUM. Mr. Richard Merrill, dean of the University of Virginia Law School, to Brooksley Born, past chairwoman of the committee. Brooksley Born, a past chairwoman, not a member at the present time, is that it?

Mr. LANE. She is a past chairperson, and she is a former member of the committee—not a member now.

Senator METZENBAUM. I want to ask both you, Mr. Buesser, and Mr. Lane, if you had known of all these calls and lobbying efforts on the part of Mr. Wilkinson, and now you do know that, do you not believe that this is a matter, that this nomination should be reevaluated by your committee, because of the relevance it has to the qualifications, temperament of a judicial nominee who would see fit to lobby the American Bar Association committee, put pressure on it?

Mr. BUESSER. Is the question addressed to me?

Senator METZENBAUM. Yes.

Mr. BUESSER. My answer to that is "No," but I agree with Mr. Lane that it militates against the favorable view that I had of Harvie Wilkinson. I would simply ascribe it to youthful indiscretion, Senator—but I would not change my mind.

Senator METZENBAUM. You are saying to us that the U.S. Senate ought to confirm a man who is guilty of youthful indiscretion and has had no trial experience and that he would be a fine member of the circuit court of appeals?

Mr. BUESSER. Well, with those senior judges sitting on both sides of him, I believe they would keep him out of this kind of trouble. [Laughter.]

Senator METZENBAUM. Mr. Lane, do you care to——

The CHAIRMAN. Your time is up, Senator. Answer his one question—we have got to move on.

Senator METZENBAUM. Sure.

Mr. LANE. Senator, I have not reached that judgment, as to which way I would go, if the committee came back. I think that I would probably lean in his favor for the same reasons that led me to conclude, after my investigation, that he had strong attributes. Even though this individual was completely unknown to me when I started this investigation—I probably started with a little bias against him, which I tried to push aside, because we do not and we make it very clear that we do not get involved in the selection process. They just give us the name, and that's the only one we have, and then we have to make a determination as to whether or not this person is qualified or not qualified. And that is the basic judgment. Can you say he is not qualified? That is a very, very severe finding—and sentence.

And, you know, sometimes you have to give the benefit of the doubt in cases where you do have very strong recommendations from individuals who have worked with and have been in close association with the individual, and after you have made a very careful investigation.

I don't know whether you know it or not, but I have generally been considered to be a Democrat and have been accused of being a liberal. When I took a look at this man and began to read some of his publications, I gained an appreciation for his high degree of scholarship and his intelligence. And then came the interview, which was quite an ordeal, because both Jim Howard and I really gave him a going over, we raised all the negatives. There is something you get in dealing with a person, when you run one of these investigations you begin to really know an awful lot about the person—it's the sum total of all the information from all the various sources. When you read his thoughts and his thought processes in some of his writings, and his ability to write very clearly, which is something that is terribly important particularly for the court of appeals, the ability to move things quickly and to write clearly—when I combine that with his behavior and the way he stood up under the rather severe cross examination given to him in our lengthy interview, and also add to that the sum total of assessments that we were able to obtain, I came down in favor of him. I could not make the finding he is not qualified, I really couldn't. And that was my honest judgment, and, for better or for worse, it's my opinion that I gave to my committee. Jim Howard and I worked very hard on this, it was a very difficult investigation—but we did the best we could.

And many times we have differences of opinion on the qualifications of individuals, but we do the best we can.

And that is about all I have to say.

The CHAIRMAN. Time's up.

Distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman. Mr. Lane, I think we all appreciate your obvious effort to be objective and helpful to the committee, and I know it's not easy for you.

You say you would probably come out the same place if you had a revision, a new hearing or a new process.

Mr. LANE. I would have to think about the thing further; I just hate to make a judgment under these circumstances.

Senator MATHIAS. I am not pressing you to do that, but you would have a slightly different feeling?

Mr. LANE. I certainly would; I certainly have additional information that I did not have until just in the last hour or so when this was raised by Senator Metzenbaum. We did not have this information about all these phone calls. We knew that there were some, but we did not have the pattern or the——

Senator MATHIAS. Did you know about the Hollowell call?

Mr. LANE. No; I don't believe so.

The CHAIRMAN. Senator, I might mention this: Mr. Wilkinson is here, and he will be called to testify, and since we are not sure where those calls went, I thought we would ask him about them and let him explain them. I think that would be the better source, since you all don't know where they went, do you, or anything about them.

Senator MATHIAS. What we are interested in, Mr. Chairman, however, is the attitude of the committee.

The CHAIRMAN. Well, how can the committee form an attitude until they have the facts?

Senator MATHIAS. We will get to Mr. Wilkinson.

The CHAIRMAN. We will have Mr. Wilkinson up and get the facts, and at that time, I think, we will bring it out.

Senator MATHIAS. Well, if I may go forward, let me ask Mr. Dunnings, how did Mr. Hollowell describe himself when he called you?

Mr. DUNNINGS. He indicated that he was a black law student attending the University of Virginia, that he was from Detroit, and that Professor Wilkinson had requested that he contact me on behalf of his candidacy for the position on the circuit bench.

I may be incorrect here, but I think he indicated that he was some relation to Damon Keith, who sits on the sixth circuit, who is a very dear friend of mine. I am not certain of that, but that's my recollection.

Senator MATHIAS. Was it your understanding, or did you have any understanding on the subject, as to whether or not he was Professor Wilkinson's student or whether he was merely a student at the law school?

Mr. DUNNINGS. No, he indicated to me that either he was currently one of his students or had been a student of his in the past. Now, I made no notes of this conversation, because I was not aware at the time that there had been this lobbying campaign; I did not know that.

Senator MATHIAS. Well, I think on this point the chairman is correct, that Professor Wilkinson is here and he can answer that.

Mr. Lafitte, did you receive any calls from either the Justice Department or the White House with respect to this matter?

Mr. LAFITTE. No; I did not, Senator.

Senator MATHIAS. All right, thank you. Thank you, Mr. Chairman.

Let me just say that I think the committee has been extremely—has made an extreme effort to be helpful to us, and I would like to express my appreciation for the efforts that you have made here today and recognize the fact that you are engaged in a form of public service that gets little reward and very little notice under most circumstances, and we do appreciate it.

Mr. BUESSER. Thank you, sir.

The CHAIRMAN. The distinguished Senator from Massachusetts, Mr. Kennedy.

Senator KENNEDY. Thank vou, Mr. Chairman. Maybe if I could ask the members of the panel to respond to a question that Mr. Metzenbaum had indicated earlier, asked Mr. Buesser, and that is given the information which is to a great extent just become available to our committee today, the extent of the contacts, the time of the contacts, which have been reviewed with some of the members of the panel, whether you do not feel that in terms of the confidence in the process, that it would be of value for your own committee to review these additional or this new information or the facts in terms of making a recommendation to the Judiciary Committee on which the Senate of the United States, the people who are going to be affected by those court decisions in the fourth circuit will be affected.

We'll start from any side—Mr. Hewitt?

Mr. HEWITT. Senator, I am troubled if in fact it was known to Professor Wilkinson that the vote of the committee was in the process of being taken.

We knew that he was under consideration. All I knew about him was that his name had been submitted to the Justice Department. We receive a status report from Mr. Buesser which lists the names of the individuals who are being investigated and who is carrying out the investigation. But that is all we know until the report shows up, if we are not carrying out the investigation.

I thought it was a close call when I got the investigation, but I was persuaded—Senator Specter asked me a question about Chief Justice Burger, and I have no recollection about talking about Chief Justice Burger. I think I did say to Ms Osolinik that I thought Lewis Powell's opinion should be given weight, and I feel that way right now, because he had worked for him, and here is a Justice of the Supreme Court who is looking at appellate records coming up all the time, he knows what the appellate court judges are doing, and I think that makes some difference.

I guess I have some difficulty drawing a distinction between, for example, the electoral process that the adminstrative and the legislative branches of the Government go through, in which they make obvious appeals to voters for their position in Government, and the position of a judge or a potential judge who might know that he is in some difficulty. I see no real problem with him making some kind of an approach to try and save himself—the lust for office I think is something that everybody is cognizant of. But I am troubled, and sincerely troubled, at the notion that it was done, if he knew that in fact the vote was in the process of being taken at the time the contacts were carried out. I was unaware of that fact, and that is troublesome to me.

Senator KENNEDY. Well, just to get back to the earlier question, would you think it would be wise if the committee itself reconsidered the—given this new information, reconsidered the decision, just to make a final judgment, a final recommendation?

Mr. HEWITT. I suspect you will get the opinion of each member of the committee who is here at this hearing this afternoon, and it is certainly a judgment that in my opinion your committee is capable of making without regard to what our opinion is. I think it would be a waste of time for us to go back and reconsider.

Senator KENNEDY. Mr. Lafitte.

Mr. LAFITTE. Senator, I think that if I had voted qualified for Mr. Wilkinson, that my view probably would not be changed by what I have heard. I would certainly agree that a campaign on the committee is unwise. I have seen this done before, I am not sure I can compare the scale, but I know of other situations or at least one other where I knew that calls were being made because the individual obviously knew that he had some adverse reports made about him. I guess I would have been annoyed, greatly so, if I had had a number of calls—and it obviously didn't come across that way because I had a couple and other people here have had one or two.

You know, I don't know what kind of counsel the gentlemen received; there perhaps are others who, not knowing about our process, might think that it's appropriate to—and not provide false information or not provide inaccurate information, but at least to make people aware on our committee of what they know about him.

I can recall an incident in which a citizen of national prominence asked me whether he ought to make a telephone call to our chairman about a candidate, and I told him no, I thought that would be a mistake, I thought it would be misunderstood—and I still believe that.

So that's why I think it's an unwise procedure, I must say. But from the standpoint of one's, you know, his integrity and his temperament, while it reflects adversely, I think, I doubt that I would change my vote if I had voted qualified for him.

Senator KENNEDY. I think Mr. Lane and Mr. Buesser responded to the question earlier, unless there is something you want to add.

Mr. LANE. Senator Kennedy, I might add that I would want to hear from the candidate himself on the question before I made any judgment one way or another.

Senator KENNEDY. Fair enough. I think you responded.

Mr. Buesser.

Mr. BUESSER. Well, Senator Kennedy, you should know that the revelation of the extent of the telephone calls made by Senator Metzenbaum a few minutes ago was totally unknown to our committee. Up until that point, we believed that there had been calls, telephone calls, made to six or seven people and two letters—we got a couple of letters—from our committee members.

Obviously the extent of the telephoning by Mr. Wilkinson is a factor which has to be taken into account, and I have attempted to weigh it in the normal process here. And in order to explain my position, I have to go back to a particular evening in November of 1983 when I got home and there was a telephone call in which both Jon Rose and Ed Schmults were on the telephone, and they wanted to talk about several things, but particularly about this Wilkinson matter. And we discussed—they knew that there was a divided opinion, they knew that the matter was out for votes, and they wanted to know whether I thought that it would be helpful to the candidacy if there were contacts made.

And that is what I said in my letter. And I said in no uncertain terms: absolutely not, it's a stupid thing to think about, a dumb thing to do; it will be, in my judgment, regarded as in bad taste by most committee members and will be counterproductive. And, as I ultimately said, I was an accurate prophet.

Now, the question is to what extent does what I regard as the poor judgment evidenced by the candidate, Wilkinson, reflect upon his ability to discharge his duties as a judge in the Fourth Circuit Court of Appeals, and before I started on this I would have said that he was one of those "qualified" candidates that was easily qualified despite his lack of trial experience; I would have given him, if the scale ran from 1 to 10, in the area of "qualified," I would have given him perhaps a 7.

Having now been exposed to the fact that he did make these telephone calls in large numbers, I first wonder to what extent he was exposed to bad counsel in connection with that, and second, even assuming that he took it upon himself to do it, I guess I would move him in the scale from a 7 maybe down to a 2 or 3, but he would still fall on the qualified side.

And therefore I do not believe that the committee would reconsider or reach a different result in this matter.

Senator KENNEDY. This was my first question. We have gotten a little better than halfway down the panel for it in response. I would like to be able to get a response from the other members, if I could, Mr. Chairman. I am glad to proceed in that way. I will contine until I am otherwise interrupted. The Chair is quite prepared to do it at any time, but has always been fair.

Do you not think that issue is something you people ought to consider doing rather than us, the questions of bad counsel, to be able to talk with the members of the panel to be able to consider this action rather than just dropping this ball right effectively on the floor of the U.S. Senate 2 days from now? That is effectively what you are saying.

Mr. BUESSER. You addressed it to us. Do you believe we will change our vote?

Senator KENNEDY. My only question is that you reconsider, but not necessarily change your question.

Mr. BUESSER. Possibly that was Senator Metzenbaum's question of whether we would change our vote. I would not change my vote, but I would lower my opinion. Should the matter be further considered, I do not believe the result would be any different.

The CHAIRMAN. I believe your time is up, Senator.

Senator KENNEDY. Can the rest of them finish, or shall I come back to having them answer the same question?

The CHAIRMAN. It is a matter of parliamentary inquiry.

Senator EAST. It seems to me as the hour goes later and later, with all due respect to the Senator from Massachusetts, we should stick to our rotation schedule.

The CHAIRMAN. You have the floor, Senator. You have 10 minutes.

Senator EAST. I would like to make an observation on what I have aready heard.

First of all, I am a little bit troubled with what is creeping in here now, I think, erroneously and improperly and inappropriately, the assumption that Mr. Wilkinson had a lobbying effort going. All of a sudden, I find it strange—and I am not faulting anyone on this committee—that the assumption, which, in a court of trial law would be the point you are trying to prove, is now assumed to be the case, that he did, in fact, do that. So we now seem to have implicitly accepted that as a conclusion of law, which has been reached by the careful introduction of fact and the cross examination of witnesses.

Based on my trial experience, I think that experienced trial lawyers would not easily fall for accepting such a conclusion of law which should only be established by the even further interrogation of witnesses behind the witnesses they heard.

For example, Mr. Dunnings heard from a black law student. I would want to hear from the black law student who called him.

Now, Mr. Dunnings says he was troubled not so much with with that call, but with the affirmative action attitudes Mr. Wilkinson. I would then want to pursue whether he believes in the "quotas" concept, but I will forego that.

We are told Mr. Howard objected because he thought there was a lack of compassion. I would like to know how he came to that conclusion, and where the witnesses were who were indicating that Mr. Wilkinson had a lack of compassion.

Senator Metzenbaum, using a very clever trial lawyer ploy, cites a list of phone calls and then this whole panel, which is made up almost exclusively of lawyers, are saying, "My goodness, Mr. Wilkinson was conducting a lobbying campaign."

Senator **Metzenbaum**. May I ask a question?

Senator **East**. I have the floor, and I would appreciate the Senator letting me make the point.

Mr. Wilkinson in his letter of August 7 to Senator Thurmond, says:

> I am pleased to provide per your request a list of those persons whom I asked to speak in my behalf to members of the ABA Standing Committee and the Federal Judiciary. These individuals were in a position to evaluate my ability and temperment, and I requested they provide that assessment to the ABA Standing Committee members. The list is complete, to the very best of my knowledge and recollection.

He lists a number of people, describes who they are, and then he lists the various phone calls that were made. But I would submit that, from looking at this list of names to call that a sinister, improper lobbying campaign would, I submit, be at least a tentative proposition. It is, on the contrary, very normal procedure for a man to ask those whom he knows intimately to provide information to a committee that he knows is trying to receive it from an infinite variety of sources, and apparently is doing so.

In short, we are back to the fundamental premises that the ABA Committee does not act in the form of a sequestered jury. Now, maybe they should change their procedures, and so be it. Maybe they should.

I want to defend Mr. Wilkinson here on the notion that now, all of a sudden, we have really come up with a big discovery, namely, "an unsavory, unwarranted, unknown, hidden lobbying campaign" on his behalf. He is the one who wrote the letter explaining whom he called, and that is where Senator Metzenbaum is getting the list of phone calls. This is what I call simply taking the conclusion of the law, the very point that you are trying to prove, and asserting it as if it has been established and in fact is so. I am sure Mr. Wilkinson can clarify this.

I hope that the media, and those who are listening here, and my fellow Senators realize that in a very short period of time, this is what seems to have occurred. We have fallen into a trap, which would seem to reflect somewhat adversely on the notion of an experienced trial lawyer.

There has been no established case here of a lobbying campaign. I think what has been suggested, and Mr. Wilkinson himself acknowledges it, that people who were familiar with his record, and with his background, from a whole variety of sources, were asked if they might be willing to give their assessment.

Is that bad? Is that wrong?

When you know that a committee is working in a rather loose ended way in terms of collecting information from an infinite variety of sources, that you are the subject being investigated, would it necessarily be unethical or improper to ask people familiar with your record and your background and your experience and your training to consider calling this ABA committee on your behalf to give their evaluation?

You are the jury now, I guess, gentlemen. Could you conclude automatically from this that this was unsavory and unwarranted conduct that might very well have changed your mind if you had known that it was going on?

So I think ultimately, Mr. Chairman, that only the nominee can successfully answer these questions. But this is what I fear, that by trying to get behind the committee's process in the case of a particular nominee, we convert it into a trial. You are in the docket.

Now, if these gentlemen from the ABA are in the docket, then I want to hear from the witnesses behind these gentlemen. I would like to hear from the black law student who called Mr. Dunnings, and get his full explanation, and so we go off and running. I see no end to it in the future, Mr. Chairman. But I would like for the record to show that I feel categorically that nothing has been established to show by this recitation of phone calls that, all of a sudden, we have on our hands here a candidate who engaged in unsavory and unseemly and unethical conduct. I do not think the record will bear that out, and I want the record to show my strong protest about our falling for that false bait so quickly and so eagerly here late in the afternoon. Maybe fatigue is setting in. The spirit is willing, the flesh is weak, but let us keep our eye on what we are doing here now. I fear we could be getting close to the point of simply engaging in a little bit of a lynch mob mentality.

That, I am going to fight with every resource in my body. I could ask Mr. Dunnings—he is interested in the affirmative action categories. Who does he include in that? I will forego asking that. Does it include minorities? He said, of course, yes, blacks; Hispanics, yes; physically handicapped? Well, I do not know if it does I would want to know. I am in a wheelchair.

We are off and running down the road of affirmative action versus quotas, and so on and so forth. I think we need to back off here and cool off, and realize that. I regret that, because of the political processes of the Senate floor, we have gotten ourselves into a mighty big ditch here that I wish we had not

If we had had the separate hearings on what your general ABA processes are, and not done what we have done with a particular nominee, that would be one thing. As it is, this process makes it extremely stressful for him, and I think unfair to him, as it would be with any other nominee we consider, whether it be for the district court of appeals, or perhaps even in the case of our confirmation of Supreme Court Justices, like Sandra Day O'Connor.

I see we have a vote, Mr. Chairman. I will cease and desist.

The CHAIRMAN. We have to go and vote, and that will give everyone a chance to stand and stretch a little bit.

[Short recess.].

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

I know that it is in the interest of the Chair to proceed with Mr. Wilkinson himself, and I look forward to hearing his testimony. I am just wondering if my time had expired.

The CHAIRMAN. If you want to continue, you may.

Senator KENNEDY. I will proceed in my own way, if I can.

I would like to inquire from Mr. Howard and Mr. Dunnings the inquiry I had before about being given the new information that we have had here in the course of this hearing, whether you think it would be of any help both to this committee in terms of our meeting our responsibilities to the U.S. Senate, and that is certainly one of the most important that this committee has. The Senate as a rule has the advice and consent and responsibility, and this committee first the responsibility in terms of the U.S. Senate in advising and consenting on judicial appointments.

Given this new information, wouldn't it be wise if the committee itself gave some consideration to these facts, considered it within the committee itself, and then advised?

Mr. Howard?

Mr. HOWARD. Senator, I was extremely disappointed with the breach of confidentiality by the Justice Department, and I was appalled by what I term misconduct on the part of the appointee, plotting and asking evidently folks to support him.

It is my firm conviction that this matter needs restudy.

Senator KENNEDY. Mr. Dunnings?

Mr. DUNNINGS. I join in precisely what Mr. Howard has indicated. I am now going into my sixth year on the committee, and this is the first time that I have ever encountered anything of this nature.

In addition, I feel that our committee, having been furnished with this information, has a duty and an obligation to reconsider the vote we have taken, and there is a precedent for having done this in the past, maybe at a stage before it went this far, but we have voted for candidates in the past, and when something came to our attention, we have reconsidered it.

Senator KENNEDY. Do you believe that the kind of activity which Mr. Wilkinson had been involved in, whether you want to use the word lobbying, or contacting, or whatever, after information was provided directly to the Justice Department about this nomination, and trouble is of such a nature that such a reconsideration would be warranted and justified and of value to both this committee and to the Senate in its deliberations?

Mr. DUNNINGS. I certainly feel so strongly.

Senator KENNEDY. Mr. Buesser, I was wondering, during the general consideration of the nominee how much contact was made with the Justice Department regarding his performance there? We have had a great deal about the importance of contacts with the individuals who know the nominee, aware of the nominee's background. His return to the University of Virginia Law School has involved in the Justice Department. I am just wondering if you know, or perhaps it would be a better question for Mr. Lane or Mr. Howard. Do you want to respond?

Mr. **Buesser**. I will take a whack at it, Senator Kennedy.

Senator **Kennedy**. Bring the mike a little closer, please.

Mr. **Buesser**. I do not believe there was any contact between the Chairman and the Justice Department during this particular investigation that I would have regarded as unusual or peculiar to this particular case. They knew that——

Senator **Kennedy**. Let me be more precise. I do not want to interrupt you, but let me try to move the process. I am referring to the awareness by the committee that the Justice Department had been fined. I know the issue was raised earlier by Senator Metzenbaum, but I did want to at least find out whether the committee itself was aware of the fact that the Justice Department had been fined by the Federal Court under rule 37 of the Federal Rules violating the discovery rules, and whether this information was included in the report.

Mr. **Buesser**. I think that question could be better answered by the two gentlemen who investigated it.

Senator **Kennedy**. Mr. Howard, was that included?

Mr. **Howard**. I believe that question was asked previously. I did not know of the sanctions. I knew of the interrogatory problems, and so reported.

Senator **Kennedy**. If this kind of activity had occurred in your law firm, Mr. Buesser, do you think that candidate would have been made a partner of the firm?

Let the record show Mr. Buesser smiled. I guess, I do not know whether that is terribly reassuring to members of the Senate who have to vote on it.

Mr. **Buesser**. I am not sufficiently aware of the details of the whole matter, Senator Kennedy, to give an answer to the question at all. I would have to know a great deal more about the circumstances.

I have had young partners of mine come back from court telling me tales, and I have sometimes found them to be accurate, and sometimes not, and I know of a lot of arbitrary judges who have done some unfair things, and I would not form a judgment about that unless I looked into the whole thing.

Senator **Kennedy**. As I understand, the Justice Department has said this is the first time in the history of the Civil Rights Division that there had been any fines issued.

Mr. **Buesser**. I do not understand that the Justice Department said that. I understand that a young lawyer in the Justice Department said it.

Senator **Kennedy**. I will make it a part of the record that it is the Justice Department. Does that change it at all?

Mr. **Buesser**. No. The Justice Department is manned by lawyers, young and old, who are subject to the same errors, and have the same shortcomings as lawyers in law firms big and small.

Senator **Kennedy**. We are not appointing all those to the Circuit Court.

Mr. **Buesser**. That is true.

Senator KENNEDY. What conclusion do you draw, if any, from the fact that this was evidently the first time in the history of the Justice Department——

Mr. BUESSER. I do not know it to be a fact.

Senator KENNEDY. They say it is a fact.

Mr. BUESSER. Who is they?

Senator KENNEDY. The Justice Department. Robert McConnell, in his letter with respect to the question 4 which was—I will read it:

> With respect to question 4, March 11, the Department was ordered to pay $250 in attorneys' fees in the case of *U.S.* v. *Baylor.* To our knowledge this is the only case handled by the Civil Rights Division in which the Department was ordered to pay attorneys' fees for opposing counsel's motion to compel in response to interrogatories.

So, I guess that is the Justice Department.

Mr. BUESSER. It is a gentleman in the Justice Department.

Senator KENNEDY. Do you know of any other cases, Mr. Buesser, where the Justice Department, from your long experience, has been fined?

Mr. BUESSER. No, I do not

Senator KENNEDY. Do you think it is unusual that they be fined?

Mr. BUESSER. I do not think it may necessarily be significant. It may be significant, Senator, it may not.

Senator KENNEDY. Did your committee look at it?

Mr. BUESSER. Yes.

Senator KENNEDY. What conclusions did they reach on this issue?

Mr. BUESSER. The conclusion they reached was a conclusion that came down on the negative side, but it was not a controlling factor.

Senator KENNEDY. So they were aware of this particular allegation?

Mr. BUESSER. I believe they were, and I say I believe they were. The matter of the allegation was made, I think, part of it was made before, and part of it was made after our committee report was compiled.

Senator KENNEDY. What should I conclude from that answer? Did they consider it, or did not consider it? Would you say they considered the first part, but did not consider the second part?

Mr. BUESSER. I believe what occurred was that the information was supplied to us in the form of a letter from someone or other who complained against the candidate, who complained on a number of scores, and I suspect that because of the number of complaints, perhaps it was not given the same weight you are giving it now.

Senator KENNEDY. Was it in fact, or did this happen? I suppose that is a legitimate way of looking at the complaint. Did it in fact happen? That would seem to answer the question about whether it is judicious.

Mr. BUESSER. Senator Kennedy, I wish I could tell you that I have that report intimately in mind at this moment. I should have it in mind, but we do a great number of these reports, and my recollection is that we knew something about this, but I do not believe we knew the fact that the Justice Department had been fined.

The CHAIRMAN. Your time is up.

I believe that completes the second round of questionning for all of the Senators.

Does any Senator have a further question?

Senator **METZENBAUM**. I have a further question.

The **CHAIRMAN**. We will have to give the same rights to others.

Senator **METZENBAUM**. It will only take 30 seconds.

All of your members of the committee were probably at the ABA convention.

Before the Senate is called upon to vote tomorrow, would you be good enough to poll them as to whether or not they think this matter ought to be reevaluated and rejudged by the committee, in view of the new evidence that has been talked about today? Would you be good enough to do that for us?

Mr. **BUESSER**. I do not believe I could refuse Senator Metzenbaum's request. I do not know that they are all at the meeting. They were all there on Friday and Saturday. There are six or seven of us here today. Only a few are going back to Chicago, but I am. That does not mean that I cannot get hold of them.

Senator **METZENBAUM**. We vote Thursday, so there is a little additional time.

Mr. **BUESSER**. Is this an individual request, Senator Metzenbaum, or is this the request of the Senate Judiciary Committee?

Senator **METZENBAUM**. I am not asking them to go back and hold another hearing, but I am asking him to inquire of the members of the committee as to whether or not they think, in view of the new evidence that has been addressed here today, it would not be appropriate to have a further hearing on this subject. Two members of the committee have already said they think so.

The **CHAIRMAN**. I do not know that it is new evidence.

Senator **METZENBAUM**. That is up to them to decide, and I am just asking them to check.

The **CHAIRMAN**. We have had hearings before, and not a single Democrat member attended and we voted the nomination out of committee. Now we are giving you another hearing, and still, you want more time. The majority leader has set the time on this, and I cannot change that.

Senator **METZENBAUM**. I am not asking for any change, Mr. Chairman. I am asking him, to the best of his ability, to respond to us before the vote on Thursday, and I would hope he would respond to you, and to the ranking minority member of this committee, Senator Biden. I do not think it is an unreasonable request.

The **CHAIRMAN**. The American Bar Association has acted once. If they want to act again, they can.

Senator **METZENBAUM**. I think that is fair enough. I would ask you if you would, and I think two members of your committee think there should be another reconsideration of the matter.

I think you yourself agree, and I am frank to say perhaps other members of your committee agree—just a minute, I am speaking.

The **CHAIRMAN**. Excuse me. I thought you were finished.

Senator **METZENBAUM**. I think there may be some opinions expressed privately that some members of the committee, even those sitting at the table, might be less embarrassed about expressing things to you personally.

I am just asking you if you would do that. I think it is part of your responsibility, and it is part of our responsibility. I do not think there is anything inappropriate, and I do not think it is Democratic or Republican issue. I think we are sitting here to decide whether a man is going to be confirmed for the circuit court of appeals, a lifetime appointment.

I think the American Bar Association is concerned, I think we on the committee are concerned, and I would appreciate it if you would do that.

The CHAIRMAN. You spoke of two members asking for it.

Those two members voted against him in the beginning, before this matter even came up, and you were against him before this matter came up.

Mr. BUESSER. Senator Metzenbaum, I am not going to get into a hassle between you and the chairman. My understanding of the protocol of the Senate—and, believe me, it is very limited—we are to take our direction from the chairman. If the chairman asks me to do that, I will do it. If he does not ask me to do it, I will not do it.

The CHAIRMAN. I will not make any such request. Your committee has had this matter for a long time. If they won't meet and do it, it is up to them to do it. I am not going to ask this committee to do it again.

This nomination matter has been pending since last year.

Senator METZENBAUM. Mr. Chairman, I want to point out to you——

The CHAIRMAN. Senator Metzenbaum, I have ruled on it. Have you heard it?

Senator METZENBAUM. I have heard, but——

The CHAIRMAN. That is it.

Senator East, did you have some statement?

He took 10 minutes, you can take 10 minutes, too.

Senator EAST. I very much would like to make a statement.

I would like to reemphasize the point I made prior to our departing to answer a rollcall vote.

I think there has been this very unfortunate tendency of members of the Judiciary Committee, to some degree, and maybe the press and public generally, to all of a sudden accept as a conclusion of law that there was an undue lobbying effort on the part of the nominee.

I submit, Mr. Chairman, that has not been established at all. We would have to turn this into a full court of inquiry. We would have to turn it into a regular trial, if you will.

It is fascinating that we should grant that suggestion. We have not even heard from the key witness himself. He is not taking the fifth amendment. I think what you are seeing here is what I would call a railroad job, a lynch-mob mentality that, all of a sudden, comes to a great crescendo at the end of the day. There is a great lobbying effort here that was clearly inappropriate.

These gentlemen would very likely change their minds, so they ought to go back and do it all over again.

I think that we have been caught up in the political process in a Presidential election year. It is no more complicated than that.

Since you want to play the game, giving the facade of fairness as in a trial, I would want to hear from the witness himself. Let us play trial then if that is what we are going to do. Let us do not play politics, which is what we are really doing, and hide behind the facade of gentlemen who are making a very pious, somber trial inquiry. This kind of comment, hearsay, and innuendo and inference and implication, we have not even heard from the witness, who has not taken the fifth amendment, so maybe we would want to do that.

I say it is nonsense. It is politics pure and simple, and I think the committee is now sensitive to it, and I think the chairman is right, and I commend him and respect him for saying no. The answer is no, this is politics. It has nothing to do with any genuine question of competence or the question of undue influence, and I do not think that has been established at all today through any evidence.

To conclude so I think would do a great disservice to the confirmation process and do an extraordinary disservice to an extremely capable and able man, and in the future, I submit, make it more and more difficult to get able people to submit themselves to confirmation before the Judiciary Committee of the U.S. Senate for any position. I would not want to put up with this as a U.S. Senator. I would rather run for election. That is the easy way. This is the hard way—to run this gauntlet where you cannot get out and fight for yourself. Mr. Wilkinson has not yet been able today to say a word in his own defense, and now we are being told we ought to go back and reconsider all of this. Nonsense, Mr. Chairman. You are right and I am behind you and commend you for it.

I shall stop here.

The CHAIRMAN. If the Senators are through asking questions, I thought we might bring up Mr. Wilkinson.

Senator KENNEDY. I want to be heard briefly.

I want to express my appreciation to the panel here. I think a number of us have stated our gratitude to them for undertaking a very difficult and trying responsibility in our country's interest, and I think you have been helpful in the past and I think it has been perhaps a difficult day for everyone, but I want to express my appreciation.

Mr. BUESSER. Thank you, Senator Kennedy, and Senator Thurmond, on behalf of the members of our committee who are here and those who are not here.

The CHAIRMAN. We want to express our appreciation to you.

If you want to stay and hear the testimony, feel free to do that.

Mr. BUESSER. Indeed we do.

The CHAIRMAN. Mr. Wilkinson, would you come around, please? Mr. Wilkinson, would you hold up your hand and be sworn?

Will the testimony you give this committee be the truth, the whole truth and nothing but the truth, so help you God?

Mr. WILKINSON. I do.

The CHAIRMAN. Would you like to make a statement? You have been here all day.

Have you heard what is going on here?

TESTIMONY OF J. HARVIE WILKINSON, III, NOMINEE, U.S. CIRCUIT JUDGE, FOURTH CIRCUIT

Mr. WILKINSON. I appreciate very much, Mr. Chairman, the opportunity that you have extended me to speak in my own behalf, and I also appreciate the fact that this hearing is being held, because I much prefer a situation where there can be an exchange of views and where both sides can be brought out, and I regard this as a welcome opportunity to do that.

If I may first address the question of the fines on the Government for the tardy filing of the response to the interrogatories, I was unaware of the fines, but I see that they have been imposed. I understand that they were imposed in the *Baylor Hospital* case.

I did not have the authority in the *Baylor Hospital* case to file the responses to the interrogatories until the Government of the United States has settled upon a position.

Let me explain what the issue in that case was. It was a very important issue regarding the interpretation of section 504 of the Rehabilitation Act of 1973.

The question in that case was one of great moment to us all. It was a question of whether Medicare and Medicaid constituted Federal financial assistance. Medicare and Medicaid are a hybrid form of aid, and the question is whether they constitute aid to individuals or aid to institutions.

That was a question of first impression in the *Baylor* case. It was a question which the Department of Health and Human Services was discussing. It was a question which the whole Justice Department was discussing. It was a question which the White House was discussing.

For a Deputy Assistant Attorney General to have gone ahead and authorized the filing of those interrogatories which would have committed the Government further to a legal position in that case would have been beyond my authority, and I declined to do so.

I was not going to file the interrogatories until my superior in the Department of Justice had approved them, and he could not approve them until the White House, the Department of Health and Human Services, and the Department of Justice had given that important question the mature consideration that it deserved.

I would like to say generally as far as my view of pleadings, motions, briefs and interrogatories are concerned, I did my best to establish a reputation of promptness in reviewing litigating materials in the Justice Department. There are four levels of review in the Justice Department before something can be filed. It goes through the trial attorney, it goes through the section chief, it goes through the Deputy Assistant, it goes through the Assistant and, in some cases, it goes to the Attorney General himself. Delays are there all along the line.

To single out one individual and say that that individual is somehow responsible for these delays ignores the collective nature of the process.

In many instances, things are submitted to us at the last minute. When they were, I tried to review them.

Promptness was a matter of pride for me at the Justice Department, and it would be a matter of pride for me should the U.S. Senate see fit to confirm me for the fourth circuit court of appeals.

Particularly in the *Baylor* case, I was not going to step beyond my authority and commit the Government of the United States on a delicate question until the Government had considered it.

I would like also, if I may, to talk about my friends and persons who have worked with me in a legal capacity, that I asked to speak in my behalf to members of the American Bar Association Committee.

The CHAIRMAN. Speak in the microphone so we can hear you.

Mr. WILKINSON. To the members of the American Bar Assocation Standing Committee on the Federal Judiciary, I think some of the arithmetic that has been presented here has been greatly inflated.

I made not 40 or 50 telephone calls. I made 14 telephone calls in all, 14 contacts in all, over a 3-day period.

The CHAIRMAN. Did you say 14?

Mr. WILKINSON. Fourteen, and those 14 persons are the people I asked to speak for me to the members of the ABA committee, whose names are in this letter that I sent you, Mr. Chairman, and that, to the very best of my knowledge, is all that I asked to speak.

The CHAIRMAN. Without objection, your letter will be put in the record at this point.

[Material submitted for the record follows:]

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington,DC 20510

Dear Chairman Thurmond:

I am pleased to provide, per your request, a list of those persons whom I asked to speak in my behalf to members of the ABA Standing Committee on the Federal Judiciary. These individuals were in a position to evaluate my ability and temperament, and I requested that they provide that assessment to the ABA Committee member. The list is complete to the very best of my knowledge and recollection.

Mr. Mark Wolf, Deputy U.S. Attorney for Massachusetts, and Mr. Charles Ames, a partner at Hill and Barlow in Boston, to Mr. John Harrington of the 1st Circuit. Mr. Wolf has been a close friend of mine since our days at Yale, and Mr. Ames took my course in Federal Courts at the University of Virginia Law School in 1974.

Mr. Paul Bator, Deputy Solicitor General, to Mr. Robert Fiske of the 2nd Circuit. Mr. Bator and I worked together at the Department of Justice.

Mr. Ashton Phelps, President and Publisher of the New Orleans Times-Picayune, to Mr. Gene Lafitte of the Fifth Circuit. Mr. Phelps and I were friends and classmates at Yale.

Mr. Melvin Hollowell of the University of Virginia Law School, to Mr. Stuart Dunnings of the Sixth Circuit. Mr. Hollowell, third-year student at Virginia, had been in my Constitutional Law course in his first year.

Mr. David Lott, a partner at Foley and Lardner in Milwaukee, to Steven Keane of the Seventh Circuit. Mr. Lott and I had worked together on the Law Review at the University of Virginia.

Mr. Harvey Perlman, Dean of the University of Nebraska College of Law, to Mr. James Hewitt of the Eighth Circuit. Mr. Perlman and I were colleagues at the University of Virginia for some years.

Mr. Lawrence Hammond, a partner at Martori, Meyer, Hendricks and Victor in Phoenix, and Professor Paul Mishkin of the University of California School of Law, Berkeley, to Mr. John Gavin and Mr. Victor Chavez of the Ninth Circuit. Mr. Hammond and I clerked together for Justice Powell at the Supreme Court, and Professor Mishkin and I became acquainted through academic life. Mr. Hammond was in Santa Fe when I called.

Mr. Jac Sperling, a partner at Fairfield and Woods in Denver, and Mr. Waller Horsley, Immediate Past President of the Virginia State Bar, to Mr. John Pfeiffer of the Tenth Circuit. Mr. Sperling had taken a seminar of mine on equal protection law at the University of Virginia in 1974. Mr. Horsley and I have been friends of long standing. Mr. Horsley, I believe, also called Mr. Keane.

Mr. George Lynn, a partner at Maynard, Cooper, Frierson and Gale and Mr. Gibson Harris, a partner at McGuire, Woods and Battle in Richmond and Birmingham and a past president of the Virginia Bar Association, to Mr. Roland Nachman of the Eleventh Circuit.

Mr. Lynn has been a student of mine in Federal Courts at the University of Virginia and Mr. Harris and I have been friends for many years.

Mr. Richard Merrill, Dean of the University of Virginia Law School to Brooksley Born, past chairwoman of the committee. Mr. Merrill, of course, is dean of the institution where I teach.

Although I did not keep any telephone logs during this period, I am also pleased to provide you with a list of my telephone calls from home, where the vast majority of calls were made. I will, of course, be happy to respond to any questions you have in this regard.

As has been noted, Mr. Ed Schmults and Mr. Jonathan Rose spoke in my behalf. Justice Powell with whom I discussed the situation generally, informed me he called Mr. Lafitte of the Fifth Circuit. I did not request him to call a member of the committee.

I did have a list of the members of the ABA Committee. The list had no information about the ABA committee members other than that which was publicly available.

My correspondence consists mainly of thank you notes to persons writing congratulatory letters on the nomination. There is additional correspondence of a similar nature which I was unable to collect in the time provided. None of it relates to the ABA. As the telephone bills indicate, I attempted to call back and thank those who spoke to ABA members in my behalf.

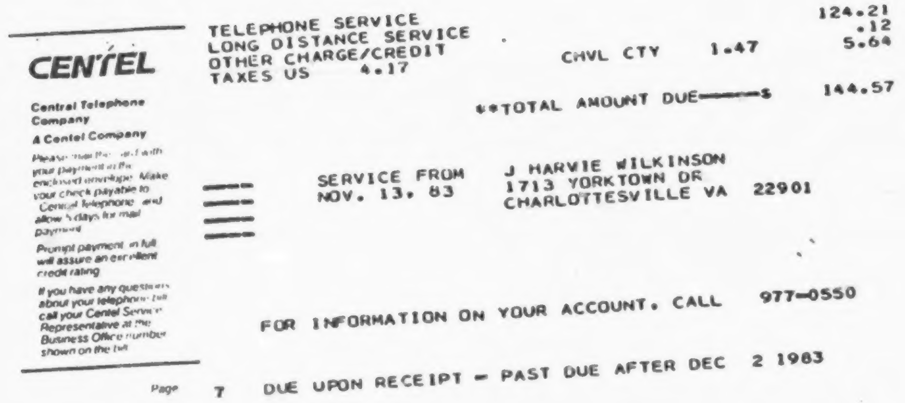
I did not keep notes or memoranda of conversations discussing my nomination. There are no diaries or appointment books pertaining to the ABA committee vote. The only relevant appointment was a meeting with Mr. Schmults and Mr. Rose on Friday afternoon, November 4, 1983.

I made the aforementioned requests on November 5-7. I am not certain that individuals were always able to reach the committee member. It is my hope, however, that they were able to assist the committee in assessing the kind of person I am and the kind of judge I would be.

Sincerely,

J. Harvie Wilkinson

J. Harvie Wilkinson, III
Professor of Law



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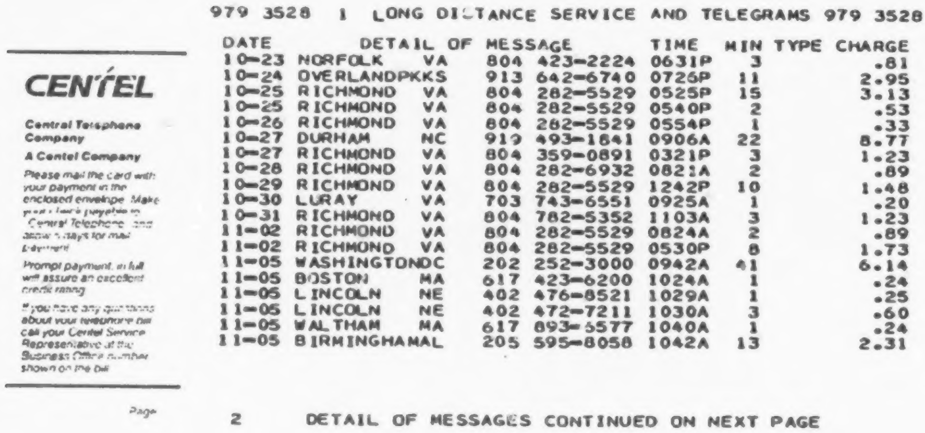

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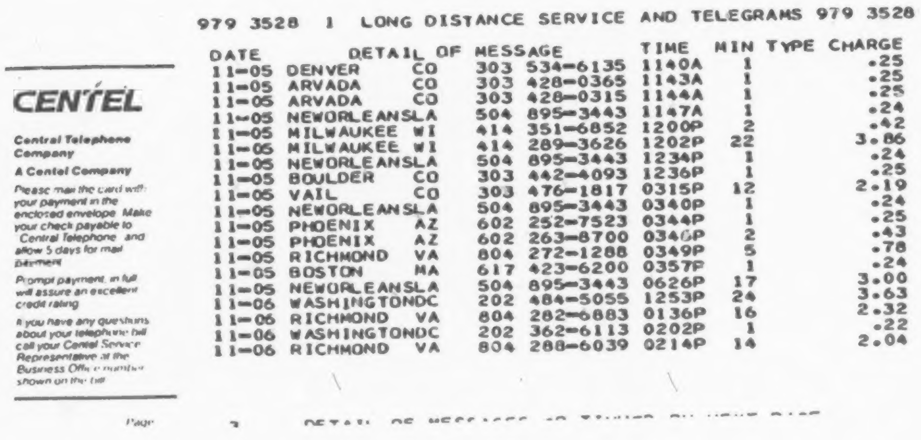

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11-05	PHOENIX	AZ	602	252-7523	0344P	1		.25
11-05	PHOENIX	AZ	602	263-8700	0346P	2		.43
11-05	RICHMOND	VA	804	272-1288	0349P	5		.78
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11-12	BALTIMORE MD	301 323-8744	0549P	12		1.94
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11-15	TARBORO	NC	919	823-2357	0910A	4		1.75
11-15	WASHINGTON	DC	202	633-2151	0939A	2		.94
11-15	WASHINGTON	DC	202	633-2151	1059A	2		.94
11-15	WASHINGTON	DC	202	633-2151	1257P	1		.57
11-15	RICHMOND	VA	804	282-5529	0115P	2		.89
11-15	WASHINGTON	DC	202	633-3845	0117P	2		.94
11-16	WASHINGTON	DC	202	633-3845	0944A	1		.57
11-16	WASHINGTON	DC	202	633-2151	0503P	2		.56
11-16	RICHMOND	VA	804	282-6932	0910P	21		4.33
11-16	ASHLAND	VA	804	798-3269	1020P	18		3.73
11-17	RICHMOND	VA	804	270-8409	0502P	1		.33
11-17	STAUNTON	VA	703	885-7416	0635P	2		.45
11-17	RICHMOND	VA	804	282-6932	0741P	5		1.13
11-17	RICHMOND	VA	804	282-6932	0846P	2		.53
11-17	RICHMOND	VA	804	288-7819	0937P	2		.53
11-17	MILWAUKEE	WI	414	351-6852	0941P	5		1.40
11-17	BOULDER	CO	303	442-4093	0950P	1		.38

2 DETAIL OF MESSAGES CONTINUED ON NEXT PAGE

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979 3528 1 LONG DISTANCE SERVICE AND TELEGRAMS 979 3528

DATE	DETAIL OF MESSAGE				TIME	MIN	TYPE	CHARGE
11-20	RICHMOND	VA	804	282-6932	0912A	3		.50
11-20	RICHMOND	VA	804	282-6932	0916A	3		.50
11-20	RICHMOND	VA	804	282-6932	0133P	1		.22
11-20	RICHMOND	VA	804	282-6932	0641P	3		.73
11-20	RICHMOND	VA	804	288-7819	0645P	2		.53
11-21	RICHMOND	VA	804	282-3779	0528P	5		1.13
11-25	RICHMOND	VA	804	282-5529	0607P	3		.73
11-27	RICHMOND	VA	804	282-5529	0434P	2		.36
11-30	CULPEPER	VA	703	825-8406	0154P	2		.81
11-30	RICHMOND	VA	804	282-5529	0528P	8		1.73
12-01	RICHMOND	VA	804	282-5529	0821P	17		3.53
12-03	RICHMOND	VA	804	282-6932	1032A	7		1.06
12-05	ALEXANDRIA	VA	703	836-4560	0342P	7		2.79
12-05	RICHMOND	VA	804	282-5529	0620P	7		1.53
12-06	WASHINGTON	DC	202	224-4515	0324P	1	3RD	2.12
	FROM CHARLOT	VA	804	293-6668				
12-06	RICHMOND	VA	804	282-5529	0946P	3		.73
12-07	RICHMOND	VA	804	282-6932	0705P	3		.73
12-08	RICHMOND	VA	804	747-6000	1139A	7		2.59

3 TOTAL LONG DISTANCE SERVICE AND TELEGRAMS $ 77.12

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979 3528 1 OTHER CHARGES AND CREDITS 12 13 83 AMOUNT

DIRECTORY ASSISTANCE CHARGES

5 CALLS IN EXCESS OF ALLOWANCE @ .12	.60

4 TOTAL OTHER CHARGES AND CREDITS	.60

Mr. WILKINSON. I appreciate that.

The CHAIRMAN. This is information you volunteered?

Mr. WILKINSON. That is information I volunteered. I wanted to be forthcoming with the committee. I wanted to give to the Judiciary Committee the full information that it needed.

The CHAIRMAN. I want to ask you this specific question. You put in 14 calls. Were they in connection with your nomination?

Mr. WILKINSON. Yes, sir, it was.

The CHAIRMAN. Did you put in those calls to people who you wanted to lobby the members of the ABA committee, or did you put in those calls to people, friends, or people who knew you, and felt that you could give facts about your qualifications to members of the ABA committee? What was your purpose in putting in those calls?

Mr. WILKINSON. I simply asked those who knew me well, to speak on my behalf. I simply came to the honest defense of my own reputation.

The only people I wanted to call were people who knew me personally, and who knew me professionally, and who knew the kind of person I was, and the kind of lawyer I was.

I asked someone to call who worked with me on the Virginia Law Review, and who knew how I worked in a collegial setting, and how I dealt with legal matters.

I asked someone to call who had clerked with me at the U.S. Supreme Court.

I asked people to call who had taught with me at the University of Virginia Law School.

I asked someone to call who had worked with me at the Department of Justice.

I asked people to call who had taken courses from me, and for the most part, had gone into practice.

I felt that those individuals had a unique perspective on the kind of lawyer that I was, and the kind of judge that I might make. They were in the best decision to know the kind of work I did.

I hope, and it was my hope, that they would provide the American Bar Association Committee with relevant information, and I acted in a belief that it was not wrong to encourage a process where pertinent information can be available, and where informed decisions can be made.

I would like to say one further thing.

The CHAIRMAN. It has been insinuated here that you were lobbying, and that it was improper. Did you consider it proper to ask people whom you had worked with in the Justice Department to express their opinions, people you taught in your classrooms to express their opinions, and other contacts who knew you well to give all the information to the members of the committee, and then the committee, of course, would draw their own conclusions?

Was there any attempt on your part to commit any improper influence here, or take any step that would be unlawful or improper?

Mr. WILKINSON. No, Senator.

All I asked them to do was to give the ABA committee an assessment, and they were willing to do so, and they seemed eager to do so. I do not believe that a Supreme Court Justice, officials in the Department of Justice, two heads of State Bar organizations, two deans of law schools, distinguished academicians, highly regarded practitioners—I think when these individuals say yes, we believe in you, we will communicate that information to the committee, and they did not indicate, in any conversations with them, that they thought it anything other than logical to communicate that information to the committee.

I do not believe that they or I have acted in a manner that was improper.

The CHAIRMAN. You volunteered this information to me. Was there any effort on your part to try to conceal or hide these contacts that you made or were you willing for the world to know about them?

In other words, you are trying to get out the facts about your qualifications.

Mr. WILKINSON. I wanted the world to know, because I felt that I had done nothing wrong. I wanted the committee to know the individuals who spoke to the ABA in my behalf. I wanted the full information out, and that is why I provided the telephone bills and also the letter. I was proud and pleased, frankly, that my fellow law clerks, my colleagues at the University of Virginia, my former students and my fellow lawyers at the Department of Justice spoke well of me. It is something of which I was proud. It was not something about which I would apologize.

The CHAIRMAN. Are the various telephone calls on that sheet, as I understand it, 14 of them concerning your nomination and 14 only? Is that correct?

Mr. WILKINSON. There were a lot of calls. If you look at the telephone lists, you will see the number of minutes spent in conversation. I suggest that the vast bulk of those calls would have 1, 2, 3 minutes of conversation. That is because I called and the individual was not at home. It does not seem to me fair to count something in a total where the individual never talks with me. I also made a decision——

The CHAIRMAN. I do not think there are concerns about how many calls you made. They are concerned with how many people you requested to speak of your actions and the manner in which you have handled your responsibilities.

As I understand from you, I understand there were 14 people you asked to speak along that line. Is that correct?

Mr. WILKINSON. Yes, Senator.

The 14 are detailed in the letter that I sent to you. There were 14.

The CHAIRMAN. Is there anything else you want to say?

Mr. WILKINSON. I suppose there is one other brief word that I would like to say, and that is that this has been called a lobbying effort, and I appreciate the concern of those Senators with the integrity of a judicial process. However, I think that one can also see and hear an element of due process; that it was me who was being evaluated, and it was my reputation at stake, and I believe it is fundamental to due process under the 14th amendment that an individual has a right to tender effort in his own behalf.

I think it is a fair hearing when an individual has an opportunity to have persons speak in his own behalf. That and only that was the motive with which I acted. I simply wanted the ABA committee to have full relevant information in arriving at an independent and just decision.

The CHAIRMAN. Is there anything else now you would like to say?

Mr. WILKINSON. I have nothing further.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Let me ask you, when did you learn about the ABA Committee's deliberations prior to their arriving at decisions? Was that about November 4?

Mr. WILKINSON. It was some point during that week, Senator Metzenbaum. I am not certain what day it was. It may have been the second or the third. It was at some point during that week.

Senator METZENBAUM. From whom did you learn it?

Mr. WILKINSON. I learned it from the Office of Legal Policy at the Department of Justice.

Senator METZENBAUM. Who was that? What person told you?

Mr. WILKINSON. I do not recall. It was either Mr. Dennis Mullins or Mr. Jonathan Rose.

Senator METZENBAUM. Immediately thereafter, did you start to make some telephone calls concerning this matter?

Mr. WILKINSON. No; I did not, Senator. I learned, I think, on Wednesday or Tuesday, and I said I was coming to Washington on Friday in any event, and someone in the Office of Legal Policy said, "Why don't we come by and we can discuss this matter," and that led to the meeting of November 4 of which I spoke in my letter to the chairman.

Senator METZENBAUM. Then, on November 5, you made a call, and your first call was to whom?

Mr. WILKINSON. I called Justice Powell.

Senator METZENBAUM. How long did you talk to Justice Powell?

Mr. WILKINSON. I talked with him 41 minutes.

Senator METZENBAUM. 41 minutes?

Mr. WILKINSON. Yes, sir.

Senator METZENBAUM. Would you tell us what that conversation was about for 41 minutes, please.

Mr. WILKINSON. Yes, sir, I will be delighted.

I called him and told him in general terms what has been told me, and that was simply that the American Bar Association committee had split; that there was a positive report from Mr. Lane, and that there had been a negative report from Mr. Howard. I told him that.

I told him that I had slept on it overnight and thought about it on the drive back from Washington, and I told him what I had decided to do. I told him that I wanted to ask people who knew me personally and who knew me professionally to give the American Bar Association that information. I simply told him that that was the course on which I would proceed.

We were both reluctant to have him involved. I made no request that Justice Powell call anyone. He informed me later that he had called Mr. Lafitte. A great deal of that conversation did not concern the ABA process at all. We had not visited in some time.

I remember asking him what his clerks were doing and how they were doing in the new term. As a former clerk, that is something that has always interested me.

He inquired about my family. I inquired about his. As I say, it had been a while since we had talked, and I simply told him in general terms what the status of the situation was.

I told him that I had slept on it and the course of action I had decided upon and the rest of the conversation was of a personal nature.

Senator METZENBAUM. And then, on November 6, the next day, you spoke to him for 24 minutes at his home, and on November 7 you called him again and spoke to him for 14 minutes at his home. On November 8, you called him again and spoke to him for 3 minutes at his home.

Is that correct?

Mr. WILKINSON. Yes, sir; that is correct.

Senator METZENBAUM. You indicated there were only 14 calls.

The CHAIRMAN. Just a minute, Senator. Let's keep the record straight. He said 14 individuals, not 14 calls.

Senator METZENBAUM. You have before your own telephone list that you made available to us and it would appear that the 60 calls that are listed there that there were substantially more than the 14 people. Let me ask you, for example, and, first, let me say you do not mention in your letter anything about Birmingham, AL, but you called somebody in Birmingham, AL on November 5. Was that in connection with your confirmation?

Mr. WILKINSON. Senator, with all due respect, I beg your pardon. I do mention Birmingham, AL. If you will look at page 2 there in my letter, the third paragraph——

Senator METZENBAUM. You are right.

Mr. WILKINSON. Mr. George Lynn is a partner in a Birmingham law firm.

Senator METZENBAUM. That law firm has partners in Richmond and Birmingham. You are correct.

You then called Boston; Lincoln, NE; Waltham, MA; Birmingham, Denver and Arvada, CO; and New Orleans; Milwaukee, Wisconsin; Boulder, CO; Vail, New Orleans, Phoenix, Richmond, Boston, New Orleans, Washington, and that was to Justice Powell; Richmond, WA; Modesto, CA; Berkeley, CA; Santa Fe, NM; Brookline, MA; Waltham, MA; Milwaukee, WI; Washington, Denver, Denver, Brookline, and on and on.

You only called 14 people out of those 60 calls. Is that what you are saying?

Mr. WILKINSON. Yes, sir. May I please explain?

Senator METZENBAUM. Please do.

Mr. WILKINSON. The Denver call, for example, I called Jack Sperling, whom I mentioned in my letter. Mr. Sperling simply was not at home. I called the office first. That is the first call to Denver. Then I called Arvada, which I suppose is somewhere near his home. They told me he was at Vail. I finally got in touch with him at Vail, but the calls to Colorado, for example, all concerned just one person, a single individual.

It is not always possible to find the individual at the first number you call. There are home numbers, there are office numbers, and in Mr. Sperling's case, he was on vacation.

You will notice also there was a call to Santa Fe. That dealt with calling Mr. Hammond.

Mr. Hammond was a partner in a Phoenix firm, but he was on a leave of absence for 1 year, and I finally got him in Santa Fe. Sometimes to track down a single individual, it would take a number of calls.

Senator Metzenbaum. In your calls, did you reach somebody who, in turn, was asked by you to reach a member of the bar committee? Did you cover every member of the bar committee or were there any who were not called?

Mr. Wilkinson. I believe Mr. VanDusen was the third circuit representative, and that is one name that comes to mind who I had no one call.

I would not have had placed calls to members of the committee unless I found someone in the area who knew me well. That is the only kind of information I wanted to convey.

Senator Metzenbaum. Had anyone told you, Mr. Wilkinson, that you had 24 or 36 or 48 hours to turn the ABA committee around?

Mr. Wilkinson. It was not put that way, Senator.

At a meeting on November 4, it was simply generally agreed that however the ABA proceeding turned out, we wanted to try to give the most complete picture possible of who I was. That was the question. We wanted to make sure not that the ABA came out this way or that the ABA came out that way, but that a just decision based on full information was made.

Senator Metzenbaum. What do you mean we? Who is included in that we?

Mr. Wilkinson. The "we," Senator, includes Mr. Schmults, Mr. Rose, and myself, the three of us, who talked on the afternoon of November 4.

Senator Metzenbaum. How many of your students, other than Melvin Hollowell, did you contact and ask for help at the ABA Committee?

Mr. Wilkinson. None. Mr. Hollowell, if I may, because I think this is an important point, Mr. Hollowell was not a student of mine at that time. He had been, Senator, a student of mine 2 years before. He was a third year law student. He had been a student of mine in constitutional law in his first year. I would not have asked students in my course to contact the ABA committee. I think that would have been exerting impermissible leverage.

Senator Metzenbaum. Did you not ask Margaret Team to contact Mr. Dunnings?

Mr. Wilkinson. I do not believe I did. She was not in my class, and I do not recall.

Senator Metzenbaum. You do not recall asking her?

Mr. Wilkinson. I do not recall asking her. I just do not recall making that——

Senator Metzenbaum. One last question.

Mr. Wilkinson. I do not recall making that request. If I made it, I do not recall it.

Senator Metzenbaum. One last question, in view of the response of members of the bar committee today indicating that that—even those who had supported you—their reservations and concerns about any nominee lobbying members of the committee, if you had to do it over again, would you follow the same procedure?

Mr. **Wilkinson**. Senator, let me just say that I understand your concern and I understand the concern of Senator Mathias and Senator Specter and Senator Kennedy, and I appreciate the genuineness of that. All I ask in turn is that you understand what my situation was. Just as a matter of fairness to an individual, and simply as a matter of due process, my reputation was at stake. My competency as a lawyer, as a professor, as a professional was being evaluated. I wanted in an honest way to come to the defense of my own reputation, and if I had to do it over again, I would.

Senator **Metzenbaum**. I have no further questions.

The **Chairman**. Senator Mathias.

Senator **Mathias**. Thank you, Mr. Chairman.

Professor Wilkinson, you have referred several times to due process. As a professor of constitutional law, would you not say that due process primarily applies to a deprivation of life, liberty or property?

Mr. **Wilkinson**. Senator, I think the due process is involved in any kind of hearing on an individual where the result of that hearing could have a major impact upon an individual's reputation. There is a constitutional case called *Wisconsin* v. *Constantino* which says that an individual has a liberty interest under the due process clause in his or her reputation, and I believe that that was a fair reading of the situation here. I think that the Supreme Court has said that when an individual's reputation is at stake, as a matter of due process, as a matter of fairness, he or she ought to have the right to tender evidence in one's own behalf.

Senator **Mathias**. Was in fact your reputation at stake? If you had gotten an adverse recommendation from the Bar Association, would it not have been simply because you were young, you were inexperienced, you had virtually no trial experience? These are certainly not matters that mitigate against you as an individual, or you as a lawyer, but simply matters of fact which, obviously, were concerns to the committee, but which have no personal reflection on you or any professional reflection. Weren't they something that time would, unfortunately, cure?

Mr. **Wilkinson**. I appreciate very much that interpretation of it. It is hard to know how I think people would have interpreted it. I suppose different people would have looked—might have looked upon it different ways. I think that the concern was—the question before the committee was is this individual qualified to sit on the Fourth Circuit Court of Appeals, and I think that a negative response to that question would have reflected adversely upon my reputation. If the standing committee had ruled negatively, I could accept that, and I would accept that with some equanimity, as long as I felt that my side of the story had been put forward to a full and complete extent.

Senator **Mathias**. But you were not aware of any particular attacks made on your reputation, were you?

Mr. **Wilkinson**. Senator, I did not know the full contents or much about the contents of the report. I did not—it was impossible for me to tell what the contents of the report were. I heard Mr. Buesser say earlier today that there were no particular problems, and I would certainly hope the situation was, as you described it. I simply was not privy to the report.

Senator MATHIAS. There were some questions that might have arisen. Cardinal Mazarin is credited with having said, "Oh, that mine own enemy should write a book!" You have not only written several books, but you have written a lot of editorials and, of course, in that body of editorials you touched upon many, many subjects. On the 7th of May, 1981, you began an article—or you are purported to have begun an editorial, I do not know that you signed them, so I cannot say with certainty that it was your work—but the editorial in the "Virginia Pilot," at any rate, on the 7th of May, 1981, began "Compulsory busing is madness; compulsory busing between cities and suburbs is madness multiplied."

Does that sound familiar?

Mr. WILKINSON. Yes, sir.

Senator MATHIAS. As an editorial writer, you have every right to make that statement, but as a member of the Fourth Circuit Court of Appeals, you will be considering the question of busing in the light of the decision in the *Swann* case, which I believe is still the law of the land. I do not know that any member of this committee is very happy about busing. We are not just smart enough to have thought of anything better to do, and so I for one support busing simply because of the lack of a better tool to use for a difficult problem.

But what would Judge Wilkinson say on that subject, as opposed to Editor Wilkinson?

The CHAIRMAN. Senator, I am not too sure it is proper to ask a judge what position he is going to take in some future case. That question has arisen before, and my recollection is that it was considered improper to ask him what he would do in a particular situation in a particular manner.

Senator MATHIAS. That is a rather general situation and a rather general observation I am asking for, but in deference to the chairman, let me change the question.

The CHAIRMAN. I think it would be better, Senator, in view of the past record.

Senator MATHIAS. Let me ask Professor Wilkinson if he would consider the *Swann* case precedent which would command his respect if that subject should ever come up? I think this goes, Mr. Chairman, not to Professor Wilkinson's current judgment about a subject, because I give him credit for being the kind of person that would make a decision on the basis of the issues before him when they arose, not because he is a conservative, as Senator Trible says he is, or because he is something else that somebody else says he is, but because I think he is somebody who would decide the cases on the issue. But it does go to the question of judicial temperament. How does he feel about this subject, is it madness multiplied, or is the Supreme Court actually sane after all?

Mr. WILKINSON. I think I would like to respond in two parts.

First of all, it seems to me that writing a judicial opinion is a far cry from writing an editorial, and I think the analogy to the kind of judicial opinion, should I be confirmed, I would write is found in my scholarship and not in my editorials. My book, "Brown to Bakke," deals with the question of compulsory transportation and although I made clear my opposition and my reservations about compulsory transportation in that book, I would hope, Senator, that you find that I did so in a measured and a tempered way, and I would hope also that you would find that the personality of the judge lies in that book and not in that editorial. And I would also say, in response to the other part of your question, Senator Mathias, and that is that my respect for the integrity of my craft would transcend any personal philosophy or ideology.

My discretion on the court of appeals is a limited one. It is limited by the acts of Congress and the regulations implementing them. It is limited by Supreme Court precedent, including the *Swann* case that you have just cited. It is also limited by the prior decisions of the Fourth Circuit Court of Appeals, because I believe that one of the ways in which the courts of appeal get off base is with intracircuit conflicts and judges of different philosophies and panels of different philosophies going in different directions. So my first obligation, Senator Mathias, would be as a lawyer and to the discipline of the craft of judging.

Senator MATHIAS. Now, another controversial issue——

The CHAIRMAN. Senator, your time is up. Do you want to take more or do you want to come back?

Senator MATHIAS. I will come back.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

Just to get back to this earlier issue with regards to the response to the interrogatories and your opening statement which you indicated that there was a collective judgmental process that had failed.

I am wondering if you felt that there ought to be a request for any additional time to be able to respond to the interrogatories so that the collective judgment process can proceed and, if you did, whether you made any request?

Mr. WILKINSON. We did make requests for extensions of time and I want to say in that case, I understood the frustration of the trial attorneys and I understood the frustration of the Federal judge, but the problem in government litigation is simply that you were not litigating in one case in one court. You were litigating a policy that will extend nationwide, and I think that the Attorney General and the Assistant Attorney General and everyone who was discussing the case would have felt that I went beyond my authority had I committed the Government in one case to a nationwide position which they were reviewing.

Senator KENNEDY. The only point I raise is in the order itself it says the court finds that no additional extensions were sought by the plaintiff, neither by agreement between the parties, or by consent of the court.

Mr. WILKINSON. As I remember, we did try to seek extension. That is always what we would do, whether an appellate brief or trial motion, we would seek extensions and I—as best I recall, we attempted to seek those extensions.

Senator KENNEDY. As I understand, there were some extensions, but the document itself in its final order concluded that no additional extensions were sought by the plaintiff at the time of its final——

Mr. WILKINSON. We had sought some before that.

Senator **Kennedy**. But you did not at the time—prior to the time of the order.

Mr. **Wilkinson**. We tried to seek every extension that we could.

Senator **Kennedy**. Well, Mr. Chairman, could we include that order as a part of the record at an appropriate place or do you want me to take the time to read it? I will be glad to just move on.

The **Chairman**. That is all right.

Senator **Kennedy**. Can we move on to another item?

The **Chairman**. Do you want the entire or just——

Senator **Kennedy**. In fairness to the witness, I think the memorandum and the order ought to be made a part of the record.

Senator **Mathias**. On what case?

Senator **Kennedy**. On the *United States* v. *Baylor.*

Mr. **Wilkinson**. I was not permitted to file the interrogatories——

Senator **Kennedy**. If you would like to give—I would be glad to have you either take it—I do not wish to take a lot more time on this since my time is ticking away, but in fairness I would be glad to have you submit a more complete response to this particular order on this particular point just as a matter of a part of the record. I would like to have this made part of the record so the members are able to know what we are talking about.

The **Chairman**. Without objection, it will go into the record.

[The following was received for the record:]

SMITH, SMITH & FLORSHEIM
ATTORNEYS AT LAW
4050 FIRST NATIONAL BANK BUILDING
DALLAS, TEXAS 75202
(214) 748-7081

February 18, 1983

Mr. Daniel P. Butler, Attorney
Civil Rights Division
Department of Justice
HOLC Building
320 First Street, N.W.
Washington, D.C. 20530

Re: United States of America v.
Baylor University Medical Center
Civil Action No. CA3-82-0453-D
In the United States District Court
Northern District of Texas

Dear Mr. Butler:

I am enclosing for your files one copy each of Defendant's Motion to Compel Answers to Interrogatories and Motion to Produce Documents, Memorandum in Support of said Motion, and a proposed Order which we have filed this day in the above referenced case. In accordance with the Court's local rules, we have attempted to contact you several times over the past few days to confer about this Motion, but have been unable to reach you.

Yours very truly,

Bowen L. Florsheim

Bowen L. Florsheim

BLF:jhc

Encl.

cc: Mr. Timothy M. Cook

[illegible] TEXAS
FILED
MAY [illegible]
[illegible] CLERK
By R Edmiston
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)
)
V.) CA3-82-453-D
)
BAYLOR UNIVERSITY MEDICAL CENTER)

ORDER

Pursuant to an order of reference filed on February 24, 1983, came on to be considered the Defendant's Motion to Compel Answers to Interrogatories filed on February 18, 1983, and having heard the statements of counsel and reviewing the pleadings, the court finds and orders as follows:

Subsequent to the filing of the Defendant's Motion on February 18, 1983, the Plaintiff has filed written answers to the previously served interrogatories. Therefore this aspect of the Defendant's Motion seeking an order to require the Plaintiff to file answers has been rendered moot.

The court further finds that the Defendant's interrogatories to the Plaintiff were filed on November 3, 1982, and that the time within which to file answers was extended until January 4, 1983, by agreement of the parties.

The court further finds that no additional extensions were sought by the Plaintiff either by agreement between the parties or by an order from the court. The Plaintiff's answers were filed only after the Defendant's Motion to Compel had been filed, and the court finds that the Defendant's failure to file answers within the time agreed to by the parties was not substantially justified. There are no circumstances which make an award of expenses unjust.

The court further finds that the Defendant has incurred reasonable attorney's fees in the preparation, filing and presentment of its Motion to Compel in the amount of $250.00, and that the Defendant should recover such sum from the Plaintiff pursuant to Rule 37(a)(4), Federal Rules of Civil Procedure.

IT IS, THEREFORE, ORDERED that the Defendant shall recover the sum of $250.00 from the Plaintiff as reasonable attorneys' fees.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 11th day of March, 1983.

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR 4 1983
NANCY S. HALL, CLERK
Deputy

UNITED STATES OF AMERICA,
Plaintiff,
v.
BAYLOR UNIVERSITY MEDICAL CENTER,
Defendant.

CIVIL ACTION NO. 3-82-0453-D

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND MOTION TO PRODUCE DOCUMENTS

On November 1, 1982, Defendant filed with this Court its First Interrogatories and Motion to Produce Documents to Plaintiff. The response to these interrogatories was due on or before December 6, 1982. The United States, plaintiff in this action, requested and obtained from defendant an extension of time until December 21, 1982, and then January 4, 1983. Since January 4, 1983, the United States has been in contact by phone with the defendant to inform it that there would be further delay. Attached hereto is Plaintiff's Response to Defendant's First Interrogatories and Motion To Produce Documents.

Our delays in filing have been the result of the amount of time required to gather the information needed to answer defendant's interrogatories and motion to produce and the amount of time required for internal review of those answers by officials. The information needed for these answers has been gathered from several offices, in both Washington, D.C., and Dallas, Texas, involving several different government agencies. Moreover, the internal review process has taken longer than expected due to the important nature of the questions raised with regard to Section 504 of the Rehabilitation Act of 1973. We apologize for any inconvenience to the Court or the defendant caused by the delay in the filing of these answers.

Respectfully submitted,

James A. Rolfe
United States Attorney

Original Signed by
Cheryl B. Wattley

Cheryl B. Wattley
Assistant United States
Attorney

Wm. Bradford Reynolds
Assistant Attorney General

Daniel P. Butler
Timothy M. Cook
Attorneys
Civil Rights Division
U.S. Department of Justice
HOLC Building
320 First Street, N.W.
Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) CIVIL ACTION NO.
)
BAYLOR UNIVERSITY MEDICAL CENTER,) CA3-82-0453-D
)
)
Defendant.)

DEFENDANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND MOTION TO PRODUCE DOCUMENTS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now BAYLOR UNIVERSITY MEDICAL CENTER, Defendant in the above styled and numbered cause, and pursuant to Rule 37, Federal Rules of Civil Procedure, moves this Court as follows:

1. Defendant, BAYLOR UNIVERSITY MEDICAL CENTER, moves this Court for orders compelling Plaintiff, UNITED STATES OF AMERICA, to answer fully and without limitation and to otherwise properly and fully respond to Defendant's First Interrogatories and Motion to Produce Documents to Plaintiff, heretofore served on Plaintiff by Defendant on the 5th day of November, 1982 and to which Plaintiff has wholly failed to make any response at the time of this Motion. In this regard, Defendant would show the Court that said Interrogatories and Motion to Produce, all in

due form and in accordance with the Rules of Civil Procedure, were served on Plaintiff on November 5, 1982 and answers and responses were due on or before December 6, 1982. By agreement of counsel and at the request of Plaintiff, time for answering said Interrogatories and responding to said Motion to Produce was extended until December 21, 1982, and subsequently, to January 4, 1983. Since January 4, 1983, despite repeated assurances that the answers and other responses immediately would be forthcoming, absolutely no response of any kind has been made to said Interrogatories or Motion to Produce. Therefore, in accordance with Rule 37(a), Federal Rules of Civil Procedure, this Defendant is entitled to entry of an Order directing the Plaintiff to answer fully and completely all of said Interrogatories and to produce all documents requested in Defendant's Motion to Produce and that said answers and responses be made forthwith. Further, in this regard, Defendant would show the Court that Plaintiff, having failed to make any timely responses or answers, has waived any and all objections which might have been raised to said Interrogatories and Motion to Produce.

2. Defendant further moves this Court, in accordance with Rule 37, Federal Rules of Civil Procedure, for Orders directing Plaintiff to pay to Defendant the sum of $1,500.00 as reasonable expenses, including attorneys' fees, incurred in seeking from Plaintiff answers and responses to Interrogatories and to its Motion to Produce and in obtaining the Order herein sought.

In this regard, Defendant would show that Plaintiff's failure to make proper responses after January 4, 1983 was without substantial justification.

3. A copy of Defendant's First Interrogatories and Motion to Produce Documents to Plaintiff, which was served on Plaintiff, is attached hereto as Exhibit "A".

WHEREFORE, PREMISES CONSIDERED, Defendant, BAYLOR UNIVERSITY MEDICAL CENTER, moves this Court for Orders compelling Plaintiff to make immediately full and complete answers and responses to Plaintiff's First Interrogatories and Motion to Produce Documents to Plaintiff and further ordering and directing Plaintiff to pay to Defendant the sum of $1,500.00 as reasonable costs and attorneys' fees in accordance with Rule 37, Federal Rules of Civil Procedure, and for such other and further relief to which this Defendant may show itself justly entitled.

Respectfully submitted,

SMITH, SMITH & FLORSHEIM

By Bowen L. Florsheim
Robert W. Smith
Bowen L. Florsheim

4050 InterFirst One Building
Dallas, Texas 75202
214/748-7051

Attorneys for Defendant,
Baylor University Medical Center

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument was served on Mr. Timothy M. Cook and Mr. Daniel P. Butler, Attorneys, Civil Rights Division, U. S. Department of Justice, HOLC Building, 320 First Street, N.W., Washington, D.C. 20530 this 18th day of February, 1983, by certified mail, return receipt requested.

Bowen L. [illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	CIVIL ACTION NO.
v.	)	CA3-82-0453-D
BAYLOR UNIVERSITY MEDICAL CENTER, Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

On November 5, 1982, Plaintiff was formally served by Defendant with copies of Defendant's Interrogatories and Motion to Produce Documents in accordance with Rules 33 and 34 of the Federal Rules of Civil Procedure. The Interrogatories and Motion to Produce were in proper form and otherwise in accordance with the requirements of the Federal Rules of Civil Procedure and the local rules of this Court. By agreement of counsel, and at the request of Plaintiff, the time for answering said Interrogatories and responding to the Motion to Produce Documents was extended to December 21, 1982 and subsequently another extension was granted by counsel for Defendant to January 4, 1983. Since January 4, 1983, despite repeated assurances that the answers and other responses would be forthcoming immediately, no response of any kind has been made to the

Interrogatories or to the Motion to Produce. Plaintiff has presented no objections to the Interrogatories or Motion to Produce, either as to form or substance, and has given no reason for the delays. This case is now set for trial on the Court's May 31, 1983 docket and it is impossible for this Defendant to even begin properly preparing for trial unless it receives proper responses to its discovery requests.

In accordance with Rule 37 of the Federal Rules of Civil Procedure, Defendant has filed a Motion for entry of Orders compelling Plaintiff to respond to its Interrogatories and its Motion to Produce Documents. Defendant submits that it is apparent on the face of the matter, Plaintiff having failed to come forward with any form of objections or any attempts to justify its delays, that Defendant is entitled to entry of its Order. Further, under the Rules and, again, because of Plaintiff's failure to even attempt to justify its delays, Defendant is entitled to recovery of its costs and attorneys' fees incurred in obtaining the Order sought and otherwise obtaining its discovery.

For the reasons submitted above, Defendant urges this Court to enter its Order compelling Plaintiff to answer Defendant's Interrogatories and Motion to Produce and also directing Plaintiff to pay to Defendant its costs, including reasonable attorneys' fees of $1,500.00.

Respectfully submitted,
SMITH, SMITH & FLORSHEIM

By Bowen L. Florsheim
Robert W. Smith

4050 InterFirst One Building
Dallas, Texas 75202
214/748-7051

Attorneys for Defendant, Baylor
University Medical Center

CERTIFICATE OF SERVICE

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Bowen L. Florsheim

The CHAIRMAN. And you feel free, if you wish, to respond further.

Mr. WILKINSON. The only response I would make is I had no authority to file the response to the interrogatories without the approval of my supervisors.

Senator KENNEDY. Had you made such an appeal to your supervisors in this particular case?

Mr. WILKINSON. Yes, Senator.

Senator KENNEDY. Who was that to?

Mr. WILKINSON. Mr. Reynolds was my immediate supervisor, and I simply had no authority to file the response to the interrogatories without his approval. I simply could not do it.

Senator KENNEDY. This is helpful then. Your response is that you made the request of Mr. Reynolds and he rejected it and, therefore, you took the penalty.

Do I understand——

Mr. WILKINSON. No, because I think that that—I want to make clear what the basis of Mr. Reynolds' reservation was, and that was that the White House, the Justice Department, and Health and Human Services had not reached a considered position for the Government in the case, so he in turn was responsible to others.

Senator KENNEDY. But evidently he felt that it was not necessary to request additional time or to accede to your request for additional time. He rejected your request.

As I understand, you are telling us now that you asked for additional time from Reynolds and he, for reasons you have outlined, rejected that request.

Mr. WILKINSON. I informed him of the situation and I told him what the situation was, and he felt, and I think for good and sufficient reasons, he felt that the—before we went further down the trail on the question of whether Medicaid and Medicare were Federal financial assistance—this was also at issue in the *Grove City* case. The Government had not filed a brief yet in that, and that had the question of whether the student aid, Pell Grants, were Federal financial assistance under title IX, and he felt that to start leading out in front in district court in the *Baylor* case before the Government's position had been determined in the *Grove City* case, would have been improper also. So I want to say that I believe that Mr. Reynolds acted properly in this matter also.

Senator KENNEDY. I again come back to it. He was the one that effectively turned you down.

Mr. WILKINSON. I could not follow the response without his permission, but I do not want to create the impression we were at loggerheads over the situation.

Senator KENNEDY. You either made a request or you did not.

Mr. WILKINSON. I informed him fully of the situation and told him what I thought we were facing, that the district judge wanted the interrogatories filed.

Senator KENNEDY. So you did not make a request. You just notified him of the situation. Is that correct?

Mr. WILKINSON. I told him. I told him what the situation was. I said is it possible to file the interrogatories. His response was I do not feel we can file the interrogatories. This situation is pending in *Grove City*. There is a White Conference on it. I think representatives of Health and Human Services, the Justice Department, and White House should discuss this position at the White House and I think that—and I know it was discussed in the Attorney General's office with a large number of persons at the Justice Department and I think Mr. Reynolds felt he could not strike out on his own.

Senator KENNEDY. So basically they ignored the court on this issue then.

Mr. WILKINSON. Pardon me?

Senator KENNEDY. Basically they ignored the time requirements on this issue. You knew what was going to happen. You were satisfied that you were going to be found, I guess, in violation, as the order provides, if you did not file, and you felt that was sufficient justification not to file. Am I correct?

Mr. WILKINSON. Well, I do not think that anyone—no one took lightly the prospect of a fine, but at the same time, I know I did not feel I had the authority to do it. I do not think Mr. Reynolds felt he had the authority to do it until the situation was resolved at a higher level. That is all.

Senator KENNEDY. Just to go back to earlier questions, could you tell us something about the meeting that you had with—on November 4 with Mr. Schmults and Mr. Rose—let me go on. Can I withhold that?

You have indicated during the course of the response to other questions here that you wanted to bring to the attention of the bar association the full range of individuals who might be able to reflect both on your scholarly work and also on your temperament and attitude and potential as a member of the circuit court and, therefore, in response to an earlier question, you indicated the different types of individuals that you contacted to call respected members of the bar association. Did you ever mention those same individuals to Mr. Lane and Mr. Howard when they came down to interview you in this process which they referred to? Couldn't you think it would have been more appropriate for you to raise the names of those individuals who could talk about your scholarly work and academic work and your temperament with those individuals?

I suppose the first question is:

Did you raise those same individuals that you have testified to that you called or others with Mr. Lane and Mr. Howard?

Mr. WILKINSON. No, sir, I did not.

Senator KENNEDY. Why not?

Mr. WILKINSON. The interview, I think, lasted 2½, 3 hours. They were the ones that were asking me questions. It just simply never came up. I tried to—thought that the purpose of my meeting with them on that day was simply to try to respond to the questions that they had to ask me. I just felt that at that point it was not—at that early stage of the investigation process, that it was not my proper role to suggest exactly how they ought to go about their reports.

Senator KENNEDY. Do you think it would have been more appropriate if those individuals contacted Lane and Howard rather than the bar association, since they were the ones doing the investigation?

Mr. WILKINSON. No; I see nothing wrong, Senator, with the full membership of the ABA Standing Committee on the Judiciary having personal conversations and contracts with someone who knows the members as well. I think that makes the process broader. I think it is not a bad thing if Mr. Hewitt, for example, could have a conversation with Dean Perlman because Dean Perlman was someone who knew me well and someone who Mr. Hewitt knew and someone in whose judgment he apparently had some degree of confidence. To me I think that facilitates the process.

Senator KENNEDY. This was not done until you found out that your nomination was in trouble. Is that correct?

Mr. WILKINSON. The phone records that I have given you indicate that the call of Mr. Perlman, for example, was made, I think, on the 5th or 6th.

Senator KENNEDY. The contacts, the stepped-up contacts that is indicated in your list of phone calls, was not begun until after you were notified your nomination was in trouble.

Is that correct?

Mr. WILKINSON. It was done after the meeting of the 4th, and I wanted, yes, to make—to have those individuals contact the members of the standing committee on that weekend.

Senator KENNEDY. I see my time is up, but I have some more questions.

The CHAIRMAN. The distinguished Senator from North Carolina.

Senator EAST. Mr. Chairman, I do not wish to appear intemperate in tone, but I think that I would describe what I have seen here as a rather intensive fishing expedition in which, badly mixing metaphors, one dry hole after another keeps coming up. I would like to get back to this question of lobbying.

Probably not longer than 45 minutes ago, the feeling was that there was some undue effort that had been made on the part of the nominee, and to me, he has very clearly allayed those fears. First, it is clear from the ABA's committee that it has a very open-ended process of receiving information. I would not ask the nature of the documents that Senator Kennedy sent by Federal Express to each member of the ABA review committee. Were they negative in content? I am not trying to embarrass the Senator. He has every right to do that. But what he is doing is providing information to the ABA committee. Many others are doing that as well.

Now, Mr. Wilkinson said, knowing it is an open-ended process, a little bit of a free for all, of providing information to this ABA committee, that as a matter of precedural due process, of fairness, he feels that perhaps he ought to see that some is provided too because, obviously, the opposition apparently was doing this.

Now, it is natural that a man do that. I ask any fair-minded man and a member of the bar, which all of you are, and I am, what it would mean for the ABA committee to come back with an unqualified rating? Senator Mathias, with all due respect for him, and I have the greatest admiration for him—says, well, what difference would it make. It would mean you were too young or it would mean you were too inexperienced——

Mr. MATHIAS. I did not say what difference would it make. I said it would be based on subjects that were not a matter of moral turpitude. We have not yet reached the point where youth is a matter of moral turpitude. In fact, I would be willing to try to do it again.

Senator EAST. You make light——

Senator MATHIAS. I do not make light at all. I was pointing out you do not have to say your reputation is at stake.

Senator EAST. It is my time and I would like to appreciate the time, to utilize——

Senator MATHIAS. When you quote incorrectly, then it becomes my time.

Senator EAST. The Senator can use his own time to refute what I am saying.

As I caught the essence of the Senator's remarks, they went something like this: So they did come back with an unqualified rating. That should not unduly upset you. We are not dealing with a case where the Supreme Court refuses to grant certiorari, and we all know that essentially that means only that the Court refuses to grant certiorari. But now if a live human being, a lawyer of his prestige or stature, a professor at a leading law school, is in danger of getting an unqualified rating in a very open-ended process of trying to gather information, then I submit, as an elementary matter of human nature, as an attorney, and I daresay any attorney in this room or this country would feel it is only fair that he have people who knew him, who might give a positive assessment or at least an objective assessment would also provide information.

Is this not fundamentally basic, elementary due process? To put the label "lobbying," on it, I think, is unfair and unnatural, and could not be expected of any licensed attorney, let alone one with the distinguished record that he had.

The Senator from Maryland implies that there would be no adverse implication. I submit to the contrary. What if you were nominated, any lawyer in this country, for a judgeship? The ABA verdicts come back, "unqualified." Would you say, oh, well, no damage done. Sure, damage is done. It is done to your reputation and one thing a man wants to do, or a woman wants to do, is to defend his or her reputation. I think Mr. Wilkinson has made it fully clear by telling us the names of the people he called, why he called them, and that it was a part of his whole rather open-ended, informal process of gathering information by the committee. It is just like Senator Kennedy, who sent documents by Federal Express to each member of the ABA committee. So the nominee asks that certain information be sent and so did others. I might have. Others may have. I do not think you can call that comment in all fairness, a lobbying effort. I think that finally that what it comes down to is whether there was unethical, unseemly conduct in this regard on the part of the nominee. Having heard from the witness finally, and I am gratified we finally had the opportunity to do so, I do not see how reasonable minds could draw the conclusion that what he did was unethical or improper, Mr.Chairman. It was natural for a man with a professional reputation at stake to do it and he had candidly disclosed the people he did call, and it is fully understandable why he would do that. It isn't a lobbying campaign. It is providing information to this ABA committee and I am glad that that has been clarified.

So I feel that these long hearings, that have been going on since 10 o'clock this morning, have been useful, very valuable, a good learning experience, but I do not think, in conclusion, Mr. Chairman, that they have laid a glove, one glove, on the nominee. There has been a great effort to do so, but it has not occurred, and I would ask how any fairminded Senator looking at his credentials and looking at the exhaustive way we have gone into this today, could come away with any other conclusion other than that he is clearly qualified. A substantial majority of the committee has indicated so. I do not see that anything has changed. Certainly nothing in my opinion has changed. I think the witness has done himself great credit in his testimony in all of these matters. He has told us why he sought people to contact the ABA committee. I dare ask, and I would not put them on the spot, would a member of this committee have done the same thing? I think that is is very likely that you would have. People familiar with you, your academic background, your reputation in the law, people who had practiced with you—what did they think of you? Common sense would tell you that opponents of you would do that. Are you to sit and be indifferent? You call people to respond on your behalf. Is that unethical? Is that undue? Why, you would be foolish. I agree with the professor, it is fairness, elementary fairness, and it is the very nature of man to want to defend himself. That is all he was doing. Let us not call that lobbying. Let us call that fairness and the common sense of the human predicament.

I do not mean to get overly philosophical about it, but I think that is what we come down to. I respect the opposition, every member of it, people of great integrity, and I understand their intellectual honesty, but I think they have fished all these holes and we come up with nothing. I do hope the U.S. Senate confirms this fine gentleman, because if it does not, I think it reflects not on the nominee, it is going to affect very adversely on the confirmation process and the Judiciary Committee as well as the Senate of the United States.

Thank You, Mr. Chairman.

The CHAIRMAN. I put this letter into the record earlier, but I think it would be well, pursuant to the position that the nominee is taking, to read it. I think the press ought to hear this letter.

This is written to me by the nominee, today's date.

DEAR CHAIRMAN THURMOND: I am pleased to provide, per your request, a list of those persons whom I asked to speak in my behalf to members of the ABA Standing Committee on the Federal Judiciary. These individuals were in a position to evaluate my ability to temperament, and I requested that they provide that assessment to the ABA Committee member. The list is complete to the very best of my knowledge and recollection.

Mr. Mark Wolf, Deputy U.S. Attorney for Massachusetts, and Mr. Charles Ames, a partner at Hill and Barlow in Boston, to Mr. John Harrington of the 1st Circuit. Mr. Wolf has been a close friend of mine since our days at Yale, and Mr. Ames took my course in Federal Courts at the University of Virginia Law School in 1974.

Mr. Paul Bator, Deputy Solicitor General, to Mr. Robert Fiske of the 2nd Circuit. Mr. Bator and I worked together at the Department of Justice.

Mr. Ashton Phelps, President and Publisher of the New Orleans Times-Picayune, to Mr. Gene Lafitte of the Fifth Circuit. Mr. Phelps and I were friends and classmates at Yale.

Mr. Melvin Hollowell of the University of Virginia Law School, to Mr. Stuart Dunning of the Sixth Circuit. Mr. Hollowell, third-year student at Virginia, has been in my Constitutional Law course in his first year.

Mr. David Lott, a partner at Foley and Lardner in Milwaukee, to Steven Keane of the Seventh Circuit. Mr. Lott and I had worked together on the Law Review at the University of Virginia.

Mr. Harvey Perlman, Dean of the University of Nebraska College of Law, to Mr. James Hewitt of the Eighth Circuit. Mr. Perlman and I were colleagues at the University of Virginia for some years.

Mr. Lawrence Hammond, a partner at Martori, Meyer, Hendricks and Victor in Phoenix, and Professor Paul Mishkin of the University of California School of Law, Berkeley, to Mr. John Gavin and Mr. Victor Chavez of the Ninth Circuit. Mr. Hammond and I clerked together for Justice Powell at the Supreme Court, and Professor Mishkin and I became acquainted through academic life. Mr. Hammond was in Santa Fe when I called.

Mr. Jac Sperling, a partner at Fairfield and Woods in Denver, and Mr. Waller Horsley, Immediate Past President of the Virginia State Bar, to Mr. John Pfeiffer of the Tenth Circuit. Mr. Sperling had taken a seminar of mine on equal protection law at the University of Virginia in 1974. Mr. Horsley and I have been friends of long standing. Mr. Horsley, I believe, also called Mr. Keane.

Mr. George Lynn, a partner at Maynard, Cooper, Frierson and Gale and Mr. Gilson Harris, a partner at McGuire, Woods and Battle in Richmond and Birmingham and a past president of the Virginia Bar Association, to Mr. Roland Nachman of the Eleventh Circuit. Mr. Lynn has been a student of mine in Federal Court at the University of Virginia and Mr. Harris and I have been friends for many years.

Mr. Richard Merrill, Dean of the University of Virginia Law School to Brooksley Born, past chairwoman of the committee. Mr. Merrill, of course, is dean of the institution where I teach.

Although I did not keep any telephone logs during this period, I am also pleased to provide you with a list of my telephone calls from home, where the vast majority of calls were made. I will, of course, be happy to respond to any questions you have in this regard.

As has been noted, Mr. Ed Schmults and Mr. Jonathan Rose spoke in my behalf. Justice Powell with whom I discussed the situation generally, informed me he called Mr. Lafitte of the Fifth Circuit. I did not request him to call a member of the committee.

I did not have a list of the members of the ABA Committee. The list had no information about the ABA committee members other than that which was publicly available.

My correspondence consists mainly of thank you notes to persons writing congratulatory letters on the nomination. There is additional correspondence of a similar nature which I was unable to collect in the time provided. None of it relates to the ABA. As the telephone bills indicate, I attempted to call back and thank those who spoke to ABA members in my behalf.

I did not keep notes or memoranda of conversations discussing my nomination. There are no diaries or appointment books pertaining to the ABA committee vote.

The only relevant appointment was a meeting with Mr. Schmults and Mr. Rose on Friday afternoon, November 4, 1983.

I made the aforementioned requests on November 5-7. I am not certain that the individuals were always able to reach the committee member. It is my hope, however, that they were able to assist the committee in assessing the kind of person I am and the kind of judge I would be.

I think that covers the context I believe you made, did it not?

Mr. WILKINSON. Thank you, Senator Thurmond, it does.

The CHAIRMAN. In other words, every contact you made, as I understand here, was somebody who knew you, who had worked with you, whom you had talked to or had an association and who could assess your qualifications. Was that the purpose in putting in these calls?

Mr. WILKINSON. That is correct.

The CHAIRMAN. Was this a lobbying effort on your part to do something improper or to bring pressure on people to get them to change their vote or something of that kind?

Mr. WILKINSON. I simply wanted to provide the committee informatin from people who knew me well.

The CHAIRMAN. I thought in fairness to the nominee this information ought to be brought out. I think it would be helpful to those who oppose his nomination to.

The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Wilkinson, do you remember the nature of the call between you and Mr.—I guess you said it was Mr. Schmults—who was it that called you prior to the November 4, from the Justice Department, do you remember?

Mr. WILKINSON. I think I earlier responded it was someone from the Office of Legal Policy and it was either Mr. Mullens or Mr. Rose and I am not certain which one.

Senator KENNEDY. Can you tell us about that conversation?

Mr. WILKINSON. They simply—I was informed that Mr. Howard had written a negative report and Mr. Land had written a positive report.

Senator KENNEDY. What else were you informed?

Mr. WILKINSON. That was the extent of it.

Senator KENNEDY. Was there any reference to the questions of time when the bar association was going to be making a final judgment?

Mr. WILKINSON. I was told that the vote was going to be at some point during the next week.

Senator KENNEDY. What else were you told?

Mr. WILKINSON. I was told no source at any time—at no time was I told the name of anyone who made any comment. At no time was I given any confidential information about members of the committee. I was simply told that Mr. Howard had filed a negative report and Mr. Lane had filed a positive report and a vote was going to be taken at some time in the following week.

Senator KENNEDY. Did they indicate to you that that was confidential, that Mr. Lane filed one kind of report and Mr. Howard filed another? Was that confidential or nonconfidential?

Mr. WILKINSON. I was not a connoisseur of ABA committee procedures. It did not seem to me illogical. In fact, it seemed to me right to disclose the information to the one most directly affected.

Senator **Kennedy**. So what, if anything, did they tell you about the negative report?

Mr. **Wilkinson**. The only thing was what I think Mr. Rose mentioned earlier, that someone had made a comment dealing with compassion and I think Mr. Rose mentioned that earlier, and that that had been—that was one piece of information which was told to me.

Senator **Kennedy**. Is there any other information?

Mr. **Wilkinson**. Just the fact of the reports filed, who had filed them, and as I recall, there was comment made that I lacked compassion and that is what I seem to recall. There was one further piece of information, I think, that there was some question about my book from Brown to Bakke and there had been objections made about that and I think well of the book, perhaps not surprisingly. It was published by the Oxford University Press and it was well received in the Washington Post and New Republic and other respected journals and that is the extent of it.

Senator **Kennedy**. Now at some time you had the meeting on November 4 with Mr. Schmultz and Mr. Rose, did you?

Mr. **Wilkinson**. Yes, sir, I did.

Senator **Kennedy**. Was that in the Justice Department?

Mr. **Wilkinson**. That was at the Justice Department; it was, sir.

Senator **Kennedy**. Can you tell us about that meeting?

Senator **Wilkinson**. Yes; it was just a discussion of the nomination and it was basically—went over what I had been told earlier, simply the nature of the reports and it was generally agreed that we would attempt to get people who knew me to provide that information to the committee and that was really the gist of it. I remember it as an agreement between Mr. Rose, Mr. Schmults, and myself, that the ABA was going to rule one way or the other, but we ought to try to get people who knew me well to speak to committee members.

Mr. **Kennedy**. Whose idea was that, do you know?

Mr. **Wilkinson**. I do not think it originated with any one person. As I say, I would characterize the spirit of the meeting as one of general agreement.

Senator **Kennedy**. Someone at sometime, therefore, out of this discussion, suggested that the contact ought to be made with the members of the—standing members of the bar, ABA selection commitee, did they?

Mr. **Wilkinson**. That is correct.

Senator **Kennedy**. You do not know who made that suggestion?

Mr. **Wilkinson**; No; it was just a consensus, and I want to say that I contacted——

Senator **Kennedy**. What was the context——

Mr. **Wilkinson**. Excuse me, Senator, I am sorry.

Senator **Kennedy**. How do we turn this adverse report around or what was the context?

Mr. **Wilkinson**. The spirit of the meeting was this: John and Ed said to me, Jay, we believe in you and we would not have put you forward for nomination unless we believed in you and we think you will make a super judge of the fourth circuit court of appeals, and I believe that if the ABA committee decided otherwise, that there will be an injustice, and I think we ought to try to make every effort to communicate to the committee the kind of individual you are and the kind of individual we know you to be, and one of the things that was a matter of concern at the meeting was that—having Mr. Schmults and Mr. Rose and those with whom I worked at the Justice Department had not been contacted. So we felt there was additional information that we could provide to the committee.

Senator KENNEDY. Before you made any of the calls, did Mr. Rose or Mr. Schmults tell you that Mr. Buesser at the ABA said that such calls should not be made?

Mr. WILKINSON. No; as a matter of fact, at one point during the process, Mr. Buesser communicated to Mr. Rose that he thought the calls—that committee members were telling him that calls were coming in and that they felt that was not productive and John communicated that to me and after that point, I do not believe I asked any other person.

Senator KENNEDY. So that did not come up at that particular meeting?

Mr. WILKINSON. No; they encouraged me to make calls.

Senator KENNEDY. You mean Rose and Schmults?

Mr. WILKINSON. Yes, they encouraged me to call and they were going to call and, as I say, there was general agreement——

Senator KENNEDY. Did you decide who was going to call who?

Mr. WILKINSON. No. There wasn't any kind of master strategy. There was none of that.

Senator KENNEDY. Did you have an idea who they might call, they have an idea who you might call?

Mr. WILKINSON. I decided after the meeting that I was just going to go home and sleep on it and proceed and they had no idea who I was going to call and I do not think at the point I had any idea myself and I think I had a general idea that Mr. Schmults might call Mr. Fiske or Mr. Van Dusen, but there was nothing definite or precise.

Senator KENNEDY. How would you reach that conclusion or opinion? How would you reach a conclusion that Schmults said he was going to call one or two of the committee?

Mr. WILKINSON. He said he knew them.

Senator KENNEDY. So there was some discussion of names?

Mr. WILKINSON. No more than that.

Senator KENNEDY. So you decided not to call these people?

Mr. WILKINSON. No, I didn't decide not to call. I asked Professor Bator to make a call to Mr. Fish. I don't know whether the call was actually made. He may have called Mr. Harrington. I did ask Professor Bator to make a call in my behalf and he said he would be delighted to.

Senator KENNEDY. During the calls themselves, was there any discussion of time, how quickly they ought to call the members of the standing committee; do you know?

Mr. WILKINSON. When I made the calls?

Senator KENNEDY. Yes.

Mr. WILKINSON. Yes, Senator. I believe I said to the person whom I called, I understand that there will be a vote at some point next week, and I would like to provide the information to the committee at a time .when they might still consider it.

Senator KENNEDY. In any of the calls, did you ever ask that the fact that you made the call be kept under wraps?

Mr. WILKINSON. No.

Senator KENNEDY. Or kept quiet?

Mr. WILKINSON. No; I was, just as here today, I am happy to have people know what I did, and I would have expected that during the course of the conversation between the person who called the ABA committee person, that it would come out that I had made the request that they call.

The CHAIRMAN. Your time is up, Senator.

The distinguished Senator from Maryland.

Senator MATHIAS. Let me just say a good word for lobbying. My friend from North Carolina has been placing some opprobrium on lobbying. Not all lobbying is objectionable or improper. Some of it is very useful, educational, and positive. So I would not want to sit silent while he casts such aspersions on such an honorable profession.

Let me turn to a controversial issue that arose in the Justice Department during your time there.

The CHAIRMAN. Senator, just a minute.

We have been here all day. Now, if any members can avoid duplicating we would appreciate it. Senator Kennedy was not here, and has duplicated, but we can understand that.

Senator MATHIAS. I am not going to duplicate.

The CHAIRMAN. As much as we can wind up this matter, I would like to. Go ahead and do it.

Senator MATHIAS. The question of intervention arose and some charges have been made that there was a double standard applied on matters of intervention in the Justice Department and that is as simply and shortly, briefly—you understand the issue?

Mr. WILKINSON. I understand exactly what you are talking about.

Senator MATHIAS. What comment would you make on those charges?

Mr. WILKINSON. Senator, I had charge of the general litigation section in the Civil Rights Division, and school desegregation cases were one of those areas of my responsibility, and within the area for which I had responsibility, I think we applied a reasonable standard. The question is under Federal Rules of Civil Procedure, 23 or 24, whether permissive intervention ought to be permitted on the part of neighborhood school groups and on the part, I believe, of the Legal Defense Fund in school desegregation cases, and to show you why I do not believe that a general—a double standard was applied, in the Charleston and Choctaw County case, Senator Mathias, I think the Department, without going into internal views, the Department ultimately decided to oppose intervention under rule 24.

Now, there was a Ector County, city of Odessa, TX, case and there was a question of intervention there. It was either at the trial level or before the fifth circuit, and the Ector County neighborhood schools or West Odessa Parents Association, it was a neighborhood school group, wished to intervene, and in the appellate brief on which I worked, I said we are going to oppose the request for intervention on the part of this neighborhood school group. I said we cannot be consistent if we are talking one position in the Charleston case and taking another position over here in the Ector County because the question with respect to intervention was one of efficiency, simply that it is more difficult to settle protracted litigation with three or four or five parties sometimes than it is with two and that question of efficiency applies across the board. It just didn't apply to the Legal Defense Fund. It applies to the Neighborhood School Association as well and in that Ector County brief before the fifth circuit, in which I personally had a part, we opposed intervention there on the part of the neighborhood school group. There was no double standard.

Senator **MATHIAS**. Do you think as a general proposition that civil rights groups ought to be able to intervene if they think the Government is not in fact representing their interest?

The **CHAIRMAN**. Isn't that a question of fact in each case? Are you trying to get him to express himself on every facet of civil rights? Are you going to attempt to go into his position, that he will take as a judge, on all these issues before us?

Senator **MATHIAS**. Why don't we let the witness answer, Mr. Chairman?

The **CHAIRMAN**. I just questioned the wisdom of you going into all these questions about philosophy. Are you against him on philosophy?

Senator **MATHIAS**. I am not against him at all. I have never criticized Professor Wilkinson at any point in these proceedings.

The **CHAIRMAN**. I think we have got to stop this thing somewhere. I don't want to put this man in a position of saying what he is going to do in civil rights cases or any other case. You heard his qualifications. You can vote against him or vote for him, but to pin him down on intervention under this, under that circumstance, or intervention here, and have him go into all these matters, seems to me that you are going too far.

Go ahead and answer that question, but let us see if we can't move on.

Mr. **WILKINSON**. Senator, I think there are two considerations which have to be balanced in any kind of intervention question, in any kind of permissive intervention question. Obviously, if you have compulsory intervention, there is no problem. But the question arises if there is permissive intervention under Federal rule 24. I think you have to balance off competing considerations. I think that the one consideration is simply that in a day when courts are backlogged and judicial resources are scarce, you add an additional party, I think you make the settlement of that particular litigation more difficult. The settlement conference has become more difficult, the litigation is going to be more protracted, agreement is going to be more difficult to reach. Sometimes litigation that might be concluded in 1 year will be concluded in 18 months or 2 years with respect to additional parties.

So there is that—there is an efficiency concern on the one hand.

There is another concern, and that is the right of parties in an intervention question who are intimately affected to have their day in court, and that is why the intervention standards speak to adequacy of representation by existing parties and the question of whether existing parties are adequately representing a proposed intervenor's interest has to be balanced off against the efficiency concerns that are brought into play when you bring in additional parties. I think you have to resolve that question on a case-by-case basis.

But what I want to be assured of is that there was no double standard where we were applying one set of rules to the Legal Defense and Education Fund and another set of rules to the neighborhood school groups. That is not permissible, and that is the area of school desegregation for which I had responsibility.

Senator MATHIAS. I can't disagree with your general proposition. You will find out even here in the Senate that the smaller the committee, the more efficient it is likely to be. The more members that get involved, the more protracted the proceedings, as we have had some evidence today.

I think the critical point is, of course, as you have defined it, where you strike the balance between the efficiency factor and the interest of the intervenors. That is a matter that will go to the philosophy of the individual who makes the decision, who strikes the balance. That is a critical question of equity and fairness, which is, in my mind, more important than efficiency.

Mr. WILKINSON. Let me mention one thing. I have been talking a lot today about due process, and it seems to me that there is a due process criterion incorporated in the adequacy of interest criterion in Federal Rule of Civil Procedure 24. There is due process involved in a proposed intervenor's petition as well.

Senator MATHIAS. I was not going to bring this up, but since you have mentioned due process, one of the alert law clerks on this committee has pointed out to me that the *Wisconsin* v. *Constantineau* case that you cited has been largely overruled by *Paul* v. *Davis.*

Mr. WILKINSON. I think that *Paul* v. *Davis* did come later than *Wisconsin* v. *Constantineau,* but I do not recall there being anything directly in *Paul* v. *Davis* that said stare decisis—that the precedential value of *Constantineau* was——

Senator MATHIAS. I will leave that with you for bedtime reading.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

I understand that when I was out of the room, that Senator East noted that I had sent materials by Federal Express to members of the American Bar Committee about this nominee, and I wanted the record to show that the material was a courtesy copy of a letter sent by Senators Biden, Metzenbaum, and myself to Chairman Buesser on March 4, 1984, long after the ABA vote.

At the time that you asked Melvin Hollowell to contact Mr. Dunnings—I believe you indicated that he was no longer a student of yours. Had he requested the opportunity to use you as a reference for any employment opportunities?

Mr. WILKINSON. Let me go somewhat into the relationship.

As I mentioned, he had been a student of mine in constitutional law my first year, and he was a very fine student indeed, and he took me on at one point or another every day in class and I really appreciated his presence in my classroom, and I think there grew the feeling that mutual respect and friendship can flourish even in the face of some differences of view.

When I was at the Justice Department, Mr. Hollowell organized a group of my former students and came to Washington and had a dinner for me at Georgetown, and this was just an act of friendship on his part, which I greatly appreciated. It is one of the things that has meant as much or more to me as anything in my entire teaching career, that a former student of mine, Mr. Hollowell, would think enough to get 10 or 12 students and come up to a dinner at Georgetown. I was very touched by it. Either before or after that, Mr. Hollowell was thinking of a position in the office of Mayor Andrew Young and he asked me if I would write a recommendation for him. This is when I was at the Department of Justice, and I said to him I will be delighted to write that recommendation, because I believe in you, and I believe in the kind of person that you are, and just my independent assessment of the kind of lawyer you are going to be would lead me to write the recommendation. And I did write him a recommendation to Mayor Andrew Young.

Senator KENNEDY. Do you know of your own knowledge whether he used you as a reference in any case, either before or after this contact? Did you tell him that he could?

Mr. WILKINSON. If he asked me—at the time I contacted him, he already had a job, but—I would recommend Mr. Hollowell because—purely and simply because I like him. I think well of him personally. I think well of him professionally. I believe in him. If I believe in someone—I would only be too happy to write a recommendation for a student or for a former student or anyone whom I have had in class and whom I respect.

Senator KENNEDY. Can you tell us a little bit about the nature of the conversations with Justice Powell? Part of the reason we have to go over these again is you will notice we have a 10-minute rule. When I first came to the committee, we used to actually permit Senators to go on for days, even with Cabinet members, in order to complete their line of questioning. So I want to express to you an apology for the repetition which does appear in these kinds of proceedings that we have today but, nonetheless, I think in some extent they are important.

You had a number of calls, one on November 5, which lasted about 40 minutes. I think you outlined to some extent the nature of the conversation with Justice Powell. You had a second call, a third call, and a fourth call, as I remember, in the following days.

Can you tell us about those conversations? Did you at any time ask him to make any contacts for you?

Mr. WILKINSON. No, I did not.

Senator, as you mentioned, I did go over what I can best recall to be the nature of the November 5 conversation. Then I called him back on the sixth, and I think we talked more about—philosophically, and there is something that I remember he said. He said, Jay, you know, this may well not come through and I do not—he did not have any knowledge, he just said there is not any inside information, but he said you have to prepare yourself for that possibility. And he said I do not want you to think that this is the end of the world. He said I know you want to be a judge, but if it does not come through for you, you have your family and you have many good friends and you have your teaching, which you love, and you have your scholarship and you have your tennis and you have your mountain climbing, and I just want you to understand that this is not the end of the world, and that is the way I still feel.

Senator KENNEDY. What about the third call?

Mr. WILKINSON. It was not to discuss particular tactics. I am convinced to this day that Justice Powell does not know the individuals that I called, and I want to make it clear that the decision to proceed with the telephone calls was mine, it was not his, and I think he is unaware of the particulars of this, but the relationship is a close one and he is someone on whom, in times of difficulty, I rely on for strength and support. And I believe that that characterized those conversations as much as anything else did.

Senator KENNEDY. That is—on the third and fourth you were not bringing him up to date about what the nature of the whole process was?

Mr. WILKINSON. I told him some people that I called, but I am convinced to this day that he was not interested—he really was not interested in the particulars of it. I think he was interested in just making sure that I was serene and philosophical about what might be the final outcome.

Senator KENNEDY. And this is true about the last call?

Mr. WILKINSON. The last call was just to tell him the result and he did not have to be concerned about my being serene at that point.

Senator KENNEDY. Finally, did you ever talk to anyone at the White House about your nomination?

Mr. WILKINSON. No, Senator Kennedy, I did not.

Senator KENNEDY. At any time?

Mr. WILKINSON. At any time?

Senator KENNEDY. Yes. When, if ever?

Mr. WILKINSON. Not in connection with the ABA vote, no, sir. I did not talk to anyone at the White House about the nomination during the time period—during the period of time under discussion today.

Senator KENNEDY. I am not sure—let us say in October, did you talk to anybody in October?

Mr. WILKINSON. No, I did not. I talked to Mr. Fielding afterward, who told me that the nomination was going to be sent up, but that had nothing to do with the ABA vote.

Senator KENNEDY. After your conversation with Mr. Fielding, you had no contact in any form with the White House?

Mr. WILKINSON. No, I do not—I do not believe I did. There is one call. I just called someone whom I——

Senator KENNEDY. That is a long period of time. Let me say after you found out that your nomination was in trouble——

Mr. WILKINSON. Did I have a conversation with anyone in the White House? The answer to that is no.

Senator KENNEDY. Did you instigate a contact with anyone in the White House on your behalf after you found out the nomination was in trouble?

Mr. WILKINSON. No, sir, Senator Kennedy, I did not.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Professor Wilkinson, the largest part of the subject matter, at least as I see it, has been the contacts and the involvement of the American Bar Association, and had that not arisen when your nomination was considered by the Judiciary Committee, again speaking for myself, if would have gone through in routine fashion. And the question I have for you at this juncture, if you had this to do all over again, what, if anything, would you have done differently with respect to the contacts with the ABA?

The CHAIRMAN. Senator, he has answered that once. He can answer it again.

Senator KENNEDY. I do not think, Mr. Chairman, he has.

The CHAIRMAN. The members do not stay here and hear the questions. You go out and in. You were asked that question once, what would you do if you had to do it over again, were you not?

Senator KENNEDY. If the Chairman would yield——

The CHAIRMAN. Let him answer. Let him answer.

Senator KENNEDY. I will ask the record be read back. That question was not asked.

The CHAIRMAN. I am letting him answer it anyway. So what is the difference?

Senator SPECTER. Do you have the question?

I have been here for most of the hearing. The hearings have been protracted. It is now 7:30. This is an important matter for all of us. I have been here for most of the hearing, but that is one question that I have for you. I do not intend to get into the issue of qualifications. As I said before, that was not a concern I have. I do have a concern as to how you would have handled this differently from the ABA contacts, which is the reason I asked the question.

Mr. WILKINSON. Senator, as I mentioned before, I want to say, just first of all, that I understand from the beginning the genuineness of your concern about the ABA process, and I understand the reliance that the Senate places upon that process. And I as much as anyone want that process to be a fair and honest one, and I think that I would respectfully ask of you in turn that you understand my position in this matter, and that I felt I came honestly and I underscore that word "honestly," to the defense of my reputation. And I do not believe that a person can be faulted for that.

Let me just say also, if the Senate were to confirm me, I want to give you my personal assurance about my demeanor—what my demeanor would be from the bench, that I understand that ex parte contacts with judges are wrong. I understand that a judge must maintain the utmost sensitivity to conflicts of interest and to recuse himself in situations where those conflicts exist. I understand the need for judges to remain far, far away from the political process. And I take the deportment and demeanor of the bench seriously and the nonpartisan nature of the bench seriously, and I think what I would—if I could leave you with one impression, it would be that if the Senate were to confirm me, both in my personal deportment and demeanor and conduct, I would do all I could to become an exemplary judge.

Senator SPECTER. Thank you, Professor Wilkinson.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from North Carolina.

Senator **East**. I agree with you, Mr. Chairman. I think we have exhausted the subject. I have indicated that I think the nominee's testimony has fully exonerated from so-called lobbying or unseemly, undue influence. I think he did what would be normal, understandable, and to imply or to suggest there was anything unseemly or inappropriate about it, I simply do not think his testimony and his letter will allow any other conclusion. But what he did was a part of the process of the flow of information to the ABA Committee, and they have made their determination.

The vote was 10 to 4. There is the letter. As Mr. Buesser said, a substantial majority supported him. With all of the very good questioning today, the detail, the probative value, I have not seen anything personally that would in any way alter my feeling that we have a candidate who has exemplary, first-rate qualifications. I think he has exonerated himself through these hearings today, or if I might put it another way, I think the hearings have exonerated him. And I think they have exonerated, frankly, the ABA. They are obviously men of integrity, of independent thought. No one has suggested to the contrary. The vote was 10 to 4. The ABA has said this man is qualified.

Now, it is up to the individual Senators to make their determination and that is what the vote will be about on Thursday. I think we have covered the territory. Perhaps we are repeating ourselves.

The distinguished chairman said one could go on ad nauseam all evening on this. So I will reserve the right to pursue other lines of questioning if other Senators are going to do likewise, but I am willing to go along with the Senator. Let us call it a day. I think we have accomplished our purpose. We are over the goal line and let us depart. I am ready.

The **Chairman**. The distinguished Senator from Maryland.

Senator **Mathias**. One brief question triggered by Senator Specter's question.

What did you do differently when you heard that your calls were counterproductive?

Mr. **Wilkinson**. As I mentioned, Senator Mathias, I think Mr. Buesser communicated something of that nature to Mr. Rose and just said this is not the process that we would prefer, and we would prefer that the phone calls would stop, and they did.

Senator **Mathias**. So you did that differently?

Mr. **Wilkinson**. Yes, sir.

Senator **Mathias**. What would you have done if you kept on going?

Mr. **Wilkinson**. How do you mean?

Senator **Mathias**. What other calls would you have made?

Mr. **Wilkinson**. Well, I wanted to make certain that—I did not want each committee member to be deluged with calls. And I tried to make certain that each committee member received generally one call and certainly no more than two, because I felt that a call from—that one call from someone who knew my work well was worth more than a dozen calls from people who did not.

Senator **Mathias**. Thank you.

The **Chairman**. Any other questions, Senator Mathias?

Senator **Specter**. I do not.

The CHAIRMAN. Senator Kennedy, do you have any more questions?

Senator KENNEDY. I have no further questions.

The CHAIRMAN. Senator East, do you have any more questions?

The distinguished Senator from Virginia, Mr. Trible, the home State of the nominee, is here and he is not a member of this committee, but we are going to, out of courtesy, extend him privileges.

Senator TRIBLE. Mr. Chairman, I would not dare ask a question, but I would like to say a word by way of personal privilege.

I am not dispassionate in this matter; I did not proffer Jay Wilkinson's name to the U.S. Senate, but I happened to represent Virginia when his name was put forth by the President. I happen to know him, and I have known him for many years.

He is a man of unusual competence, it is demonstrated by every activity he has undertaken in his life. And I must say, Mr. Chairman, that in my 8 years as a Member of the Congress, I sat through a lot of hearings and subcommittee hearings, and there have been few, if any, witnesses that have responded as thoughtfully, as persuasively, and as directly to questions posed. I believe that Jay Wilkinson today has confirmed the confidence of the President, and I think also he has demonstrated, I hope to all people here, the qualities and the demeanor that we want in Federal judges, grace under fire, a thorough and impressive knowledge of the law.

How many people proffered by any President could have responded as fully and as completely and as in detailed a fashion as this man today? He has demonstrated a desire to preserve the integrity of the judicial process. Jay Wilkinson has also demonstrated an extraordinary facility of expression, an expression that was manifested in many of these writings which I commend to the committee. He is an unusual man. He will distinguish the Federal bench. And I have practiced before many district court judges and I have argued before many courts of appeal. He will distinguish the Federal bench. He will leave a lasting mark, and I hope and I pray that this body will give him that opportunity.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Wilkinson, I want to commend you for your very candid and frank testimony. I admire you for standing up for your reputation. It appears that what you did was not improper, it was not obscure, it was not hidden, it was not secret, and I am confident that you approached it in the proper manner.

I wanted to say further too that as a result of this hearing today, I am convinced more than ever that the American Bar Association reached the right conclusion when they recommended your confirmation. I believe 10 to 4, which is more than 2 to 1.

The Senate will act on your confirmation this week. It is my hope that the full Senate will see fit to confirm you, I personally feel that you will make an excellent judge on the circuit court of appeal.

If there is nothing else, we stand adjourned.

[Whereupon, at 7:40 p.m., the committee adjourned, subject to the call of the Chair.]

CONFIRMATION HEARING ON:

CYNTHIA HOLCOMB HALL, EMORY M. SNEEDEN, AND JUAN R. TORRUELLA

WEDNESDAY, AUGUST 8, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 8:08 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senator Heflin.

Staff present: Vinton DeVane Lide, chief counsel and staff director; Robert J. Short, chief investigator; Allan Spence, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet today to consider the nominations for U.S. circuit judge of Cynthia Holcomb Hall, of California, to be U.S. circuit judge for the ninth circuit; is she here?

Judge HALL. Yes, Senator.

The CHAIRMAN. Thank you.

Emory M. Sneeden, of South Carolina, to be U.S. circuit judge for the fourth circuit. Is he here?

Mr. SNEEDEN. Yes, Senator.

The CHAIRMAN. Judge Torruella, of Puerto Rico, to be U.S. circuit judge for the first circuit.

Judge TORRUELLA. I am here, Senator.

The CHAIRMAN. We will take you in the order listed here, so Judge Hall, would you come around.

I think we will swear all the witnesses at the same time, if you will all stand up and be sworn.

Do you solemnly swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God?

[Response in the affirmative.]

TESTIMONY OF CYNTHIA HOLCOMB HALL, NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

The CHAIRMAN. I understand that Senator Wilson of California endorses Ms. Hall, but has not arrived yet. When he does, we will give him a chance to make a statement.

I have a brief résumé here of Ms. Hall. She was born in California and lives there. She has been married and has two children. It sets out her education. You were in the Navy 2 years.

Judge **Hall**. That is correct; during the Korean War.

The **Chairman**. Without objection, we will put that in the record to save time.

Judge Hall, do you have any members of your family or friends here that you would like to introduce?

Judge **Hall**. I have no members of my family here.

The **Chairman**. Judge Hall, from 1972 to 1981, you were a U.S. Tax Court judge. In 1981, you became a district court judge for the Central District of California. With this background, do you have any recommendations for improvements in the judicial system?

Judge **Hall**. Senator, I have been either a trial lawyer or trial judge most of my career, and it is my observation that the most important factor in the welfare of the judicial system is the quality of the judges that you and your committee appoint and the quality of the trial lawyers that appear before them.

Only in appointing well qualified judges do I see a way of improving the judicial system substantially without complete overhaul.

The **Chairman**. Thank you. Judge Hall, do you believe that it would have been beneficial for you in your present position as a District Court judge to have a sentencing commission to establish uniformity in sentencing?

Judge **Hall**. I do not believe so, in that I think it is very important not only to have a prompt trial, but also prompt punishment, in case of a guilty finding.

We are given before sentencing by the Pretrial Services Agency of the Probation Office the average sentence throughout our district and the average sentence throughout the country for similar crimes, so that information is already before us. It is the function of the parole board as it is now constituted to even out sentences imposed by various judges throughout the country.

The **Chairman**. We passed a bill through the Senate on sentence reform that provides for a commission to be set up. It has guidelines where a judge cannot go above so much or below so much, unless the judge explains why he gave a greater or lesser sentence than the guidelines. Most of the judges, I understand, feel that this commission will be helpful. It is not binding, but it is a guideline.

Judge **Hall**. I think that would be helpful.

The **Chairman**. There would be no objection to that?

Judge **Hall**. No; not at all.

The **Chairman**. Judge Hall, do you feel that a judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge **Hall**. I do, absolutely. And we do that now in the district courts through use of the individual calendar system, which gives the judge direct control over the case from the time it is filed until the time the case is concluded.

The **Chairman**. Judge Hall, do you believe that changes in the law should be reserved to the legislative branch, whose members can be altered by the voters if the elected officials fail to reflect the values of society?

Judge **Hall**. Absolutely.

The **Chairman**. There are some judges who have taken onto themselves the running of school districts, hospitals, and other State institutions, and there are others who have applied the law as their personal opinion directs. We have a Constitution that sets out the three branches of Government; it also sets out not only the separation of powers, but the division of powers between the Federal Government and the States, and very few people seem to understand that the States have all the powers except those specifically delegated to the Union.

How do you feel about that?

Judge **Hall**. I think the legislature should write the laws, Senator. It is not my desire to take over a school district or any other institution.

The **Chairman**. I think those are all the questions I have to ask you.

I notice Senator Wilson has come in. Since he recommended you for this position, I imagine he has something to say.

Senator Wilson, we will be glad to hear from you.

STATEMENT OF HON. PETE WILSON, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Wilson**. Thank you very much, Mr. Chairman.

I have the very high honor to recommend Cynthia Holcomb Hall to the President and to this committee. I might add that, if you have not been already advised, Judge Hall comes to this hearing today from Hawaii, where she is sitting on a criminal case. She will be here just long enough to entertain the questions of the committee and then return. I think that is an indication not only of her desire for service on the ninth circuit, but an indication of the kind of dedication and energy that has marked her entire legal career, which has been varied and has provided her with superb preparation to assume the post to which she is now nominated.

I heard the chairman discussing her background. I will not repeat what is in the record. I will comment on it, though, Mr. Chairman, because I think her career has been an extraordinary one.

She has received not only fine legal training at Stanford University and George Washington, but as I believe the chairman has noted, she has a master's in tax law from the New York University Law School. There was then a brief hiatus in her legal career. She has been a mother and raised a family. Prior to marrying, she served in the U.S. Navy. She has served as a referee in juvenile court and provided pro bono publico legal aid service.

Prior to specializing in tax law in private practice, she served with the Department of Justice and with the Treasury Department. She was a tax attorney for the Government.

She has been, for the past 3 years, a highly-respected member of the bench on the Federal District Court for the Central District of California, following 9 years on the tax court, where she built up an enviable reputation. That reputation has to be deserved to be as widespread and heartfelt as it is, in fact.

She is constantly alluded to as one of the best judges on that rather distinguished bench, and perhaps the most telling thing is that she is regarded as well as she is by her peers and by the bar at-large.

She has come to enjoy a reputation for thoroughness in terms of scholarship, in terms of the quality of the opinions which she delivers, and for decisiveness. She has been a real work horse on that court. It is, I must say, a pleasant thing, but a surprise to no one that she came with as hearty and widespread recommendations as she did.

This is an appointment by the President that will reflect credit upon his administration. More importantly, it will greatly strengthen the ninth circuit.

So I will say no more, Mr. Chairman, other than that I will apologize for being back before this distinguished body, when I had earlier given you the assurance that I thought you had seen the last of me for this year. I did not reckon that Congress would move as swiftly and decisively as it did to give us the opportunity to bring new judgeships before this committee. I am delighted to have that opportunity. I am particularly delighted in the case of Judge Cynthia Holcomb Hall, because she is an extraordinary judge already, has been for some years, and I think with this opportunity will bring truly distinguished service as a member of the ninth circuit.

The CHAIRMAN. Thank you very much, Senator.

I want to congratulate you, Judge Hall, for having such a prominent Senator here to take such an interest and recommend you and come here this early in the morning to endorse you. Senator Wilson has not been here long, but he quickly has gained the esteem of the Senate. He is held by the Members in high regard, and his recommendation here, I assure you, will assist greatly in your confirmation.

Senator, we thank you for appearing. You may stay if you wish, or you may leave. Those are all the questions we have of the nominee. She can leave if she wishes, too, or she can remain if she cares to.

Senator WILSON. Thank you very much, Mr. Chairman. I appreciate your kindness to Judge Hall and to me. I appreciate your kind words. I thought you were going to say that, "Senator Wilson has not been here very long; it just seems like a long time." (Laughter.) Thank you.

Judge HALL. Thank you, Senator.

The CHAIRMAN. Thank you.

We hope you enjoy your service on the circuit bench.

Judge HALL. Thank you, Sir.

The CHAIRMAN. Our next nominee is Emory M. Sneeden, of South Carolina, to be U.S. Circuit judge for the fourth circuit.

TESTIMONY OF HON. EMORY M. SNEEDEN, NOMINEE, U.S. CIRCUIT JUDGE, FOURTH CIRCUIT

The CHAIRMAN. Dean Sneeden, do you have any family here that you wish to introduce, or any special friends?

Mr. SNEEDEN. No, sir. Governor McNair, of course, is coming up as a witness, but he is the only one.

The CHAIRMAN. Since I nominated Dean Sneeden, I will make a statement here about him.

I am very pleased today to introduce to the Senate Judiciary Committee a man whom we all know and have great respect for, Dean Emory M. Sneeden.

Dean Sneeden was born in Wilmington, N.C. He was on active duty with the U.S. Army from 1945 to 1946. After leaving the Army, he entered Wake Forest University where, in 1949, he received his bachelor of science degree. Dean Sneeden then entered the Wake Forest University School of Law. However, prior to graduation, he was recalled to active duty with the Army, and in 1953, after a brief leave of absence, he received his J.D. degree. He later attended the Hague Academy of International Law, The Hague, Netherlands. In 1955, Dean Sneeden transferred from the infantry to the Judge Advocate General's Corps, where he gained a reputation as one of the most competent and able jurists in the Army.

Dean Sneeden served with distinction throughout this period, rising to the rank of brigadier general, where he served in the very prestigious position of Chief Judge of the entire U.S. Army.

After retirement in 1975, Dean Sneeden joined the staff of the Senate Judiciary Committee. During his tenure on the committee, he served with distinction in a number of positions, including minority chief counsel and staff director for the Subcommittee on Antitrust and Monopoly; chief minority counsel for the Committee on the Judiciary, and later as chief counsel for the Judiciary Committee.

Dean Sneeden became an associate dean and a lecturer of law at the University of South Carolina Law School in 1978. After leaving the Senate, he remained in that position until he joined the very prestigious law firm of McNair, Glenn, Konduros, Corley, Singletary, Porter & Dibble, one of South Carolina's outstanding law firms.

Dean Sneeden is recognized as an able scholar. He has been a guest faculty participant in seminars at Harvard University School of Law, the John F. Kennedy School of Government, and the Brookings Institute. His publications appear in such distinguished journals as the Antitrust Bulletin and the Harvard Journal on legislation.

Dean Sneeden is known as a man of ability, integrity, and independence. He is a dedicated and trustworthy individual, whose actions exemplify the courage of his convictions. Dean Sneeden's impressive record speaks for itself. He has experience and the judicial temperament to become an outstanding judge for the Circuit Court of Appeals.

It was with considerable pride that I recommended Dean Sneeden to President Reagan for this very important position, and it is with an equal amount of pride that I present him to the committee today.

Without objection, we will place a brief résumé of Dean Sneeden in the record.

Also, I will place in the record letters I have received from Judge Donald Russell, U.S. circuit judge of Spartanburg, endorsing Dean

Sneeden; Judge Robert F. Chapman, U.S. circuit judge of the fourth circuit, endorsing Dean Sneeden; Judge William W. Wilkins, Jr., U.S. district judge in South Carolina, endorsing Dean Sneeden; Judge Charles C. Simons, Jr., chief judge of the U.S. district court in South Carolina; Judge G. Ross Anderson, Jr., U.S. district judge in South Carolina; Judge Clyde H. Hamilton, U.S. district judge in South Carolina; former Governor Robert E. McNair, who heads one of the biggest law firms in South Carolina, and who is here as a witness today; Mark W. McKnight, of the law firm of Grimball & Cabaniss, Charleston, endorsing Dean Sneeden; Harry M. Lightsey, Jr., dean of the Law School of the University of South Carolina.

Without objection, these letters will be placed in the record at this point.

[Material submitted for the record follows:]

U.S. COURT OF APPEALS,
Columbia, SC, July 23, 1984.

Hon. STROM THURMOND,
U.S. Senate,
Washington, DC.

DEAR STROM: I was delighted to hear that Emory Sneeden will be joining us on the Fourth Circuit Court of Appeals. I congratulate you on this selection and look forward to serving with Emory. I think he will be an outstanding judge.

Sincerely,

ROBERT F. CHAPMAN.

GRIMBALL & CABANISS
Charleston, SC, July 23, 1984.

Re recommendation of Emory M. Sneeden.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR THURMOND: I am writing to congratulate both you and General Sneeden on your recommendation of his appointment to the Fourth Circuit Court of Appeals. I can think of no member of the Bar better qualified by disposition, learning or wise counsel to sit with that body. Each of you have my whole-hearted admiration and support.

With kindest personal regards and best wishes to you and your staff, I remain

Respectfully yours,

MARK W. MCKNIGHT.

U.S. DISTRICT JUDGE, JUDGE'S CHAMBERS,
Anderson, SC, July 31, 1984.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee, Dirkson Senate Office Building, Washington, DC.

DEAR SENATOR: In order to allay any ethical problems, I am writing regarding Emory M. Sneeden as a private citizen, not as a United States District Judge.

My first acquaintance with Emory was in 1979 when I was being considered for United States District Judge for the District of South Carolina. At the time he was minority (Republican) counsel to the Senate Judiciary Committee.

Even though I had been a lifelong Democrat, this was of no consequence to Emory Sneeden. Never have I been treated more graciously, nor has anyone ever been of more assistance to me than General Sneeden. Party affiliation never was a factor in his evaluation of my qualifications for district judge. During this perod of time he was always straightforward, extremely fair and genuinely interested in seeing that only qualified nominees were appointed to the Federal bench.

Since becoming district judge, my association with Emory Sneeden has been more frequent. Since he returned to South Carolina as a member of one of South Carolina's leading law firms, I came into contact with him on numerous occasions, both socially and professionally, at various South Carolina Bar functions. I have had the opportunity on numerous occasions, to discuss complicated legal matters with him, and his keen intellect and perception of legal problems are without equal. He commands the respect of all lawyers and judges with whom he deals.

Blessed with an even temperament and mature judgment, Emory Sneeden would be a welcome addition to the federal bench. Without question, his impecable character and integrity, combined with his other superior qualities, will guarantee him a place of distinction among our top appellate judges.

With warm, personal regards, I am

Sincerely yours,

G. Ross Anderson, Jr.

Spartanburg, SC, *August 1, 1984.*

Hon. Strom Thurmond,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, DC.

Dear Senator Thurmond: I have heard that the President has submitted to the Senate his nomination of Emory M. Sneeden to be a Circuit Judge of this Circuit and that such nomination is being referred to your Committee. I have known Mr. Sneeden for about twenty years and I want to commend unreservedly his nomination.

Mr. Sneeden is a person of unquestioned integrity and character, recognized as such by all who know him. He has that claim and dispassionate temperament which is an essential quality for a judge. Moreover, he has a keen, trenchant, analytical mind, which approaches every problem free of cant, bias or prejudice. He has a keen sense of justice and fairness and great respect for the majesty of the law.

In my opinion, he is eminently qualified by experience for this appointment. He is an active member of the largest law firm in this State. He was a professor of law and assistant dean of the law school at the University of South Carolina. He served with distinction as chief counsel of your Committee and for the last few years has been a valued consultant of the Committee on the Judicial Branch. In short, he is a lawyer of broad experience, a teacher and scholar of recognized talent, and one who understands the processes of the federal government. These are the very talents and experiences vital to the performance of the responsibilities of a Circuit Judge.

It has been said that a great judge is an honest man, with broad human experience, of a scholarship aptitude, with a deep dedication to justice for all, endowed with an intense love of the right, and buttressed with a sound knowledge of law itself. Emory Sneeden, in my opinion, is all of these, and because I think so, I have taken the liberty of writing you this endorsement of his nomination.

Sincerely,

Donald Russell, *U.S. Circuit Judge.*

U.S. District Court,
District of South Carolina,
Aiken, SC, August 1, 1984.

Re Emory Sneeden.

Senator Strom Thurmond,
Chairman, Senate Judiciary Committee,
Washington, DC.

Dear Senator Thurmond: It has been brought to my attention that General Emory Sneeden of South Carolina has been recommended by you to President Reagan for appointment to the new position created by the recent bankruptcy legislation for the Fourth Circuit Court of Appeals.

The purpose of this letter is to heartily and enthusiastically endorse General Sneeden for this position. I have known him personally for several years and recognize him as an outstanding citizen endowed with highest traits of character and integrity. As a military man and as a civilian he has had extensive experience in the law and unquestionably he would grace the Fourth Circuit Court of Appeals if permitted to serve on that court.

I commend you personally for recomending him and only hope that his appointment and confirmation to that position will be forthcoming in the very near future.

With my warmest regards and best wishes.

CHARLES E. SIMMONS, Jr., *Chief Judge.*

MCNAIR, GLENN, KONDUROS, CORLEY, SINGLETARY, PORTER & DIBBLE,
Columbia, SC, August 2, 1984.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee,
Washington, DC.

DEAR SENATOR THURMOND: I am pleased that President Reagan has nominated Emory Sneeden for the Court of Appeals of the Fourth Judicial Circuit.

Having known Emory both personally and professionally for a number of years, I enthusiastically endorse him. He is imminently qualified for an Appeal Court position. As you know so well, he served with great distinction and success as a lawyer in the Judge Advocate General's Department handling many major cases. He also served with distinction as Chief Judge of the Military Court of Appeals. Both of these Courts operate under the same rules as those of the U.S. District Court and Court of Appeals. Thus, he has had trial experience and judicial experience which equips him for this new role.

Emory has had the unique opportunity to also serve as General Counsel of the Committee on the Judiciary. In that role, he had to be an outstanding lawyer because he dealt with issues of national and international significance. He is well known for his legal knowledge and abilities and his varied experience. A nationally known anti-trust lawyer, he also has a strong background in criminal law.

Recently, Emory has had the unusual and unique opportunity to serve as Assistant Dean of the Law School at the University of South Carolina and as a partner in this law firm. Not only has he worked on legislative matters, but he has been involved in numerous major cases with this firm. He serves as a great and valuable resource for our younger lawyers and is respected by all of us for his broad legal background and knowledge and wise counsel.

It is unusual to have someone who has had such a varied background that so perfectly equips him for an assignment of this nature.

As a former Governor of South Carolina, a lifelong member of the Democratic party, a longtime member of the Democratic National Committee, and as the senior partner in this law firm, I can, without hesitation or reservation, strongly recommend and urge the appointment of Emory Sneeden for the Court of appeals.

With warmest personal regards, I remain

Sincerely yours,

ROBERT E. MCNAIR.

U.S. DISTRICT COURT,
DISTRICT OF SOUTH CAROLINA,
Greenville, SC, August 2, 1983.

Hon. STROM THURMOND,
U.S. Senator, Russell Senate Office Building,
Washington, DC.

DEAR SENATOR THURMOND. I learned with pleasure that President Reagan had followed your recommendation and nominated Emory Sneeden for the Fourth Circuit Court of Appeals.

Mr. Sneeden is an excellent choice. He will bring to the appellate bench experience in a variety of legal fields, maturity and good common sense. His experience as a military lawyer and judge and as a private practitioner makes him well qualified for this important position. In addition, from my personal contacts with him over the past few years, I know that he possesses a personality and temperament necessary to be a good judge. He is a man of unquestionable integrity and possesses a strong sense of fair play in dealing with others. His nomination is well received by the bench and bar.

I strongly support his nomination.

With my highest personal regards, I am

Sincerely,

WILLIAM W. WILKINS, Jr., *U.S. District Judge.*

University of South Carolina,
Columbia, SC, August 7, 1984.

Hon. Strom Thurmond,
U.S. Senate, Senate Office Building,
Washington, DC.

Dear Senator: I have known Mr. Emory Sneeden for approximately six years and have had a substantial opportunity to evaluate his work, his legal knowledge, and his ethical standards. He deserves the highest grades in all three categories. He worked for me at the Law School as Associate Dean for two years during that time. His capacity to get the job done and his grasp of complex legal problems were most impressive.

I have also observed him in his practice since he left and have been most impressed with his understanding and ability. His ethical standards are among the very highest that I have witnessed during my twenty-five years in practice and at the Law School.

Finally, in my opinion, he possesses an ideal judicial temperament. He is balanced, courteous, legally competent, and will dispatch this position with intellect and integrity. I have no hesitation in recommending him and feel that he will make an outstanding member of the Court of Appeals, and certainly recommend his approval to you and to the United States Senate.

Yours sincerely,

Harry M. Lightsey, Jr., *Dean.*

The **Chairman**. Dean Sneeden, I just have a few questions here that I will propound to you.

As I previously stated, you have a very impressive record. Besides serving as chief judge of the U.S. Army Corps of Military Review—which, I might add, is the highest appellate court of the Army—you also gained considerable experience at the trial level. During your 12 years of trial work, I believe you prosecuted or defended well over 100 criminal cases in military general court. Approximately 30 percent of these cases were tried by jury.

Dean Sneeden, I am confident that you are quite knowledgeable of the laws under the Uniform Code of Military Justice. I wonder, however, if you foresee any difficulty in the transition from the military system to that used by the circuit court of appeals?

Mr. **Sneeden**. Well, Senator, during the time I was in the military, as you know, the military courts, with few exceptions, use the Federal rules of evidence in trials. And of course, I am accustomed to those. After I became chief judge of the Army, the system there, as I understand it, works fairly well, as it does in other appellate courts. The counsel on both sides file briefs within a set period of time; the judge receives the briefs, identifies the issues, and then goes to oral argument after he has prepared himself, and in addition, reads the entire record of the trial other than those parts addressed by counsel.

Now, after I left the Army, which has been 8½ years ago, I came to the Senate Judiciary Committee, and at that point in time, we were concerned, and I worked in areas ranging from criminal law to the antitrist laws. I published in areas other than in military law, and of course, with my present law firm, I am called on, on many occasions, to help our litigation attorneys identify the issues and theory of the case, in civil cases which they try, and I am counsel of record at the present time on one case.

So I think, Senator, I will work hard, but I am familiar with the civilian side of the law, and I believe I can do my job as I should do it.

The **Chairman**. There is one other recommendation I forgot to mention. We have a letter from Judge Matthew Perry, in which he says he considers Mr. Sneeden as qualified to be a judge on the U.S. Court of Appeals for the Fourth Circuit.

Dean Sneeden, would you tell the committee how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern?

Mr. **Sneeden**. Yes, sir. In those matters and those clients I have represented, I will recuse myself from any matter that I am counsel of record in, or any matter that I have assisted other counsel in the firm with.

It is my own personal feeling that I should recuse myself from cases involving clients of mine for the next 2 years, to break any contact. That is my own personal, ethical feeling, that I should do that. And any political campaigns that I am presently involved in, I think I should resign the day I am confirmed. That is my feeling, Senator, as to how to resolve any possible conflicts.

The **Chairman**. Dean Sneeden, the court to which you have been nominated, the Fourth Circuit Court of Appeals, records an 18 percent increase in new filings in 1982, the largest percentage increase among the 12 regional circuit courts of appeal in the United States. The number of appeals filed for a panel was 803, ranking this circuit first nationwide. This court also ranked first in the number of terminations per panel.

Do you have any recommendations that might assist in decreasing the number of filings without interfering with justifiable request for review?

Mr. **Sneeden**. Senator, I am, of course, unfamiliar with what those filings are, but I think probably the first thing that should be done is identify the increase in filings; then, probably through the administrative office of the courts, come to Congress if there are problems. I do not believe that you should just slash filings because you have to look to see if you are violating someone's constitutional rights, or other rights, when you approach it from that standpoint. And the ultimate is that it is within the province of Congress to pass any legislation to take care of that problem.

The **Chairman**. We passed a bill through the Senate that is going to the House—they have not acted on it; they have not acted on the big crime package we have sent them—I think we have passed the finest criminal package through the U.S. Senate, and most people feel that way, that has ever been passed through the Senate. And we are still waiting for the House to act on these measures.

But one of these measures would tend to reduce the applications that come before the appellate courts and other courts. Many times now, a man who may be convicted in State courts, goes through all the different levels of the State courts, then he goes into the Federal court, and sometimes it takes 8 or 10 years before the case is finally disposed of. So we tried to remedy that by limiting that to 1 year that he would have to go through these appeals. In the Federal system, where it originates in the Federal system, our legislation provides that it be limited to 2 years.

Do you think that would help in relieving these appeals? I believe the records show that last year, 14 percent of all the matters handled by these courts of appeals—or, the number constituted 14 percent of the total of all the business.

Mr. **Sneeden**. Senator, I am not familiar directly with the legislation, but I know the appeal time is a problem, and it is a problem that needs to be solved.

The **Chairman**. That causes a lot of people to question our judicial system, when it takes years and years to get a matter disposed of. And I am hoping we can get legislation through that will bring these matters to a close within a reasonable time. After the final action of the supreme court of a State, or after action in the Federal court, they should not be allowed to go on and on as they have been.

Dean Sneeden, the phrase "judicial activism" has often been used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority.

What does the phrase "judicial activism" mean to you?

Mr. **Sneeden**. Senator, I think I can best answer that this way—and I might say, it was philosophy as an appellate judge in the Army.

A judge, in my opinion, is there to interpret the laws passed by Congress. He is not there to pass laws of his own. He should interpret the laws passed by Congress; he should give great weight to stare decisis, that is, cases decided before.

I might back up for a minute and say, the only instance where I would disagree that he is guided by the laws passed by Congress is if the statute is in conflict with the Constitution. Of course, the Constitution is supreme.

If you cannot find any precedent, then you have to, by analogy, look at the laws of Congress, the cases; do the best you can, if there is no precedent on a point and you are facing a novel issue. That describes my viewpoint.

The **Chairman**. I think those are all the questions I have to propound to you, Dean Sneeden. I notice Governor McNair back there, who is the head of the law firm of which you are now a member, and I would be very pleased to have him come up and make such statement as he cares to.

Mr. **Sneeden**. All right, sir.

The **Chairman**. Thank you very much.

Governor, if you will be sworn—that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God.

Mr. **McNair**. I do.

STATEMENT OF ROBERT E. McNAIR, ATTORNEY-AT-LAW, McNAIR, GLENN, KONDUROS, CORLEY, SINGLETARY, PORTER & DIBBLE

The **Chairman**. Governor McNair, we have before us today the matter of the confirmation of Dean Emory M. Sneeden of South Carolina to be U.S. Circuit Judge for the Fourth Circuit. I believe he is now a member of your law firm.

Would you care to express an opinion about his qualifications for this position?

Mr. **McNair**. I welcome the opportunity, Mr. Chairman, to do that. You have read into the record the résumé. I am aware of his distinguished service in the military, as a trial lawyer, both prosecuting and defending major cases; also, the service on the military or Army Court of Appeals, both of which operate under similar rules to the district and circuit courts of appeals that we are talking about today.

He is one of the people that I think has a uniquely varied background that particularly qualifies him for an appeals court position, the experience as a trial lawyer, as a military court of appeals judge. He served this committee in many capacities, including general counsel, and having come from the State legislature, where I had the privilege of serving as chairman of the House Judiciary Committee there for a number of years, I have often referred to that as a "postgraduate course" because you deal with all of the legal issues that come before the legislative body, and he has had an opportunity to deal in that in criminal reform, antitrust reform, labor reform—all of those things.

He also has had an unusual opportunity to serve as an associate dean of the law school for a number of years, where he was highly regarded, and as an "of counsel" and as a member and partner of our law firm. We certainly look on him very highly. We value his wise counsel, his sound legal judgment, and we have mixed emotions about this, because it will be a tremendous loss to us, but it will be a real gain to the judiciary.

So I am pleased to be here to endorse him and to say, for all of us who know him well, that he is one of the most qualified people that I know for this. He has served in all of these capacities with distinction. He is one of the most respected people that I have known, respected by all.

So, I am pleased and privileged to have the opportunity of endorsing his nomination and urging its approval by this committee and by the Senate.

The CHAIRMAN. Governor McNair, how long did you serve in the State legislature of South Carolina?

Mr. McNAIR. I served 12 years in the house.

The CHAIRMAN. And you were the chairman of the Judiciary Committee of the House?

Mr. McNAIR. For 8 of those 12.

The CHAIRMAN. Eight of those 12 years. And then you served as Governor, how long?

Mr. McNAIR. I served as Governor for almost 6 years, filling Governor Russell's, now Judge Russell's, unexpired term and then a full term.

The CHAIRMAN. And you now head the largest law firm in the State, don't you?

Mr. McNAIR. Yes, sir.

The CHAIRMAN. How many lawyers have you in your firm?

Mr. McNAIR. Well, it varies as you add—it is now about 50.

The CHAIRMAN. About 50 lawyers?

Mr. McNAIR. Yes.

The CHAIRMAN. And you have offices in what places?

Mr. McNAIR. The main office is in Columbia, the State Capitol; we have offices at Hilton Head, S.C. and in Greenville, S.C., and in Washington. And Emory Sneeden is the senior partner in supervising the Washington office, but he also lives in Columbia and travels from there and spends 1 or 2 days a week in the Columbia office, where we benefit there from his counseling in matters that he has a real knowledge in. He has been a wise counselor, particularly in antitrust matters. He brings a lot when we begin to talk about mergers or acquisitions, because of his broad knowledge of the antitrust laws, and he has certainly counseled in many other capacities because of his varied background.

The CHAIRMAN. From his varied experience as a chief judge in the U.S. Army, as a trial advocate in the U.S. Army, having tried over 100 cases, and as associate dean of the law school, and as a member of your law firm, you have had the occasion to know him first hand and know of his abilities and of his legal scholarship, have you not?

Mr. MCNAIR. Yes; I have, over a number of years, because he served in an "of counsel" capacity with us for a period while he was associate dean of the law school, and then full-time. So I have seen him on a weekly basis for a number of years, have been involved with him in a number of legal matters, and yes, I believe I have a personal knowledge of his abilities. And, as I said in the beginning, he is uniquely qualified because of the unusual opportunities he has had to improve and enhance and expand his general knowledge of the law.

I mentioned that not many people have the opportunity of being a practicing lawyer or court of appeals judge in the military courts; counsel to this committee, and as an associate dean of a law school and as a member and a partner in a law firm.

The CHAIRMAN. I believe the same rules of procedure used in the military courts are used in the civilian courts.

Mr. MCNAIR. Yes.

The CHAIRMAN. So Dean Sneeden has had the opportunity to be thoroughly acquainted with those rules, practicing in the military courts as well as in the civilian courts.

Mr. MCNAIR. Yes.

The CHAIRMAN. I do not want to flatter you, but you are one of the most popular Governors our State has produced, and you know most of the people in the State. And from your experience with the lawyers in the State, and knowing Dean Sneeden, would you consider him well qualified to serve on the Fourth Circuit Court of Appeals?

Mr. MCNAIR. I would consider him extremely well qualified, and his appointment has been well received by the bench and the bar in South Carolina.

The CHAIRMAN. I notice some of the newspapers down there have written some editorials and have had some articles that were not exactly flattering to him, and the only reason I feel they could have done it was that they were not acquainted with his qualifications. Is that your opinion?

Mr. MCNAIR. Well, I think they have said that, that they do not know him; he has not been in the news, and thus, they are not acquainted with Emory Sneeden, the lawyer; they are more acquainted with him as a member of your staff, and they have not been that familiar. And I think as they become familiar, as you have noted, they have recognized that he has outstanding abilities and is extremely well qualified.

The **Chairman**. Well, Governor, we thank you very much for taking your time. I know you are a busy man, and you have a lot of lawyers to supervise, and a lot of matters to look after. And as I stated, it is the biggest law firm in the State. You were very nice to come this morning and testify in behalf of Dean Sneeden, and we appreciate it and wish to thank you.

Mr. **McNair**. Well, I am very honored to be here, and as I said in the beginning, we view it with mixed emotions. The members of the firm regret very much losing him, but at the same time we recognize what he brings to the court and what he will do in his service on the court. So my biggest responsibility over the next several months is to find two, three, or four people who will not take his place, but might take up some of the workload that he has been carrying.

Thank you very much, Senator.

The **Chairman**. Thank you very much, Governor, and Dean Sneeden, we want to congratulate you on being appointed by President Reagan.

Mr. **Sneeden**. Thank you.

The **Chairman**. I want to wish you well on the circuit bench. I feel you will make one of the ablest members of that bench, and we are very proud of you and predict great success for you on the Fourth Circuit Court of Appeals.

Mr. **Sneeden**. Thank you, Mr. Chairman.

The **Chairman**. Senator Heflin of Alabama has just come in. Senator Heflin, do you have any questions? Governor McNair, who heads the biggest law firm in the State, just highly endorsed Dean Sneeden.

Senator **Heflin**. Governor McNair is a Democrat, too, isn't he?

The **Chairman**. That is right. [Laughter.]

Senator **Heflin**. He's got his head screwed on right.

The **Chairman**. Well, he is a fine citizen. Down our way, we are not very partisan. We just try to vote for the best man. [Laughter.]

Would you like to ask any questions of Dean Sneeden or Governor McNair?

Senator **Heflin**. I would just ask Mr. Sneeden a couple of questions.

What are we going to call you—General, or Judge, or Dean? What are we going to end up calling you when you are on the bench?

Mr. **Sneeden**. Senator, you just call me Emory. How's that? [Laughter.]

Senator **Heflin**. All right, sir. You do not think you are "Thurmond-ized" too much, then, to serve on the bench, do you?

Mr. **Sneeden**. Senator, I am going to leave that answer up to you.

Senator **Heflin**. I already see that you are going to be evasive in your opinions. [Laughter.]

Well, we congratulate the President for his wisdom in your selection. We congratulate you. We had the pleasure of working with you here in the Judiciary Committee. If it weren't for the early hour, I believe every Republican and every Democrat would be here. They love you. They have great respect for you. But I reckon they had to take the choice between sleep and you today, and they chose sleep.

But I think everybody is thrilled. We have been blessed with great staff members on the Judiciary, and it has been a great tradition on both parties; people from the various staff levels have gone on the bench. One of Senator Kennedy's staff, Professor Breyer, went on the bench up in Boston. We look forward to reading your opinions and wish you the best of luck. I think it is a great appointment, and I think the Judiciary will be better off. I do not know whether my office—you come around to see me on all these issues, and inform me on them, and now I have got to listen to Governor McNair, too. [Laughter.]

Well, we congratulate the President, and we congratulate you on this great and, I think, very fine move.

The CHAIRMAN. Would you care to hear Governor McNair's endorsement? [Laughter.]

Mr. MCNAIR. All I can say is, we have been trying to "de-Thurmond-ize" him just a little bit over the last few years, Senator, and I will make one comment. When you asked what do you call him, Senator Thurmond will remember Jimmy Burns, of course, the outstanding South Carolinian. Nobody ever knew what to call him. And a youngster was sitting in the audience one day when he was being introduced, and everybody else was bursting with pride, and he reached over to his daddy and pulled his coat and he said: "You know, he must not be very good. He doesn't seem to be able to hold a job." [Laughter.]

The CHAIRMAN. Thank you very much, Governor McNair, and thank you, Dean Sneeden. You are now excused.

Mr. SNEEDEN. Thank you, Mr. Chairman.

Mr. MCNAIR. Thank you, Senator.

The CHAIRMAN. Our third judge this morning for consideration is Judge Torruella from Puerto Rico. Judge Torruella, you have already been sworn. Would you care to introduce your family and any friends that you have with you?

TESTIMONY OF JUAN R. TORRUELLA, NOMINEE, U.S. CIRCUIT JUDGE, FIRST CIRCUIT

Judge TORRUELLA. Thank you, Senator.

With me is my wife, Judy.

The CHAIRMAN. I believe you do have some people who wish to testify in your behalf.

Judge TORRUELLA. Yes, sir.

The CHAIRMAN. They can come up in a few minutes.

Without objection, we will place a brief résumé of you in the record at this point.

And Congressman Corrada has written a letter to me and the committee, highly endorsing you, which I will place in the record at this point.

[Material submitted for the record follows:]

PREPARED STATEMENT OF RESIDENT COMMISSIONER BALTESAR CORRADA

Mr. Chairman, members of the Committee, it is with a deep sense of satisfaction and pride that I support President Reagan's nomination of the Hon. Juan R. Torruella to serve as a Judge in the U.S. Court of Appeals for the First Circuit. Judge

Torruella is the first Puerto Rican to be nominated to a judgeship position in that court. I commend President Reagan for his wisdom in selecting this outstanding servant of the law and top legal scholar to fill one of the newly created positions in the U.S. Court of Appeals for the First Circuit.

The Hon. Juan R. Torruella is the Chief Judge of the U.S. District Court in Puerto Rico and a jurist of high repute. He has served with distinction and comity since his appointment to the Court by President Ford in 1974. He has sat by designation on the Court of Appeals for the First Circuit as well as on the U.S. District Courts in Maine and Massachusetts where he also displayed his fine qualities as a Judge. Judge Torruella, first as a practicing attorney and later as a Judge, has spent 27 years studying the Puerto Rican system and thus would afford the Court of Appeals in the First Circuit an indepth understanding of Puerto Rico's law as well as of issues affecting the more than 3.2 million American citizens living on the Island.

Judge Torruella obtained his Bachelor's Degree from the Wharton School of Business and Finance in 1954 and his law degree from Boston University in 1957. He has also a Master's Degree in Public Administration from the University of Puerto Rico and a Master's Degree in Judicial Process from the University of Virginia. He served as a law clerk of the Hon. Pedro Pérez Pimentel, Associate Justice of the Supreme Court of Puerto Rico, from 1957 to 1958. Judge Torruella then joined the National Labor Relations Board for the 24th Region as legal counsel. In 1960, he joined a well known law firm in San Juan, Puerto Rico. He became a partner in that law firm in 1963 and remained there until 1967. In that year he became a sole practitioner and in 1969 was joined in his practice by the Hon. Jaime Pieras, currently his colleague at the bench.

Judge Torruella is also a community oriented person concerned with the welfare of his peers. He has been a trustee at the St. Johns School and the Presbyterian Hospital in San Juan. The Puerto Rico Olympic Committee has also benefited from his dedication to the improvement of his community by having him as a member over the last 20 years. In addition, his having been a representative of the Yacht Racing Union, captain of the Yachting Federation for the Pan American Games and member of the Olympic Yachting Team vouches for his longstanding leadership in the sports community.

Mr. Chairman, I believe Judge Torruella possesses the personal qualifications and the experience as a judge and law practitioner to excel in this judgeship position at the Federal appellate level which carries such great responsibility. He is a learned jurist of high integrity who is fully committed to judicial excellence. Throughout the years at the branch in Puerto Rico, he has displayed the mature judgment, judicial independence and unyielding dedication to the ends of justice that mark outstanding jurists.

Judge Torruella will provide a sound, long-overdue presence of a Hispanic and Puerto Rican at this federal appellate level as well as an acute legal mind to aid in solving the complex issues confronted by the U.S. Court of Appeals for the First Circuit.

I wholeheartedly support his nomination and urge the members of the Committee to do so.

The CHAIRMAN. Judge Torruella, have you been a district court judge for Puerto Rico since 1975?

Judge TORRUELLA. Yes, sir. I was appointed in December 1974. I was sworn in on January 6, 1975.

The CHAIRMAN. Do you foresee any difficulty in the transition from the District Court to the Circuit Court of Appeals?

Judge TORRUELLA. I do not, sir. Although the work is somewhat different, it basically involves the analysis of judicial issues. I have, in fact, sat with the court of appeals on several cases by designation, so I am somewhat familiar with the work of a court of appeals judge.

The CHAIRMAN. Judge Torruella, would you give us your opinion on the suggestion that attorneys undergo special training before being allowed to practice in Federal courts?

Judge TORRUELLA. The District of Puerto Rico is 1 of approximately 11 district courts throughout the United States which have had pilot programs sponsored by the judicial center, involving various approaches to this issue. These include anything from giving special examinations to peer judgment by other lawyers to practice with experienced lawyers.

We have had, I think, fairly good experience with the program we have in Puerto Rico. I do not know that yet all the wrinkles have been ironed out. I believe the Federal Judicial Center is still working on this.

I do think that practice before Federal courts at times involves slightly different procedures and substantive law, of course, than State courts, so that I think probably some type of procedure is required, or should be considered, such as this pilot program that we have been engaging in.

The CHAIRMAN. Judge Torruella, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of the legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Judge TORRUELLA. I can think of no situation. I believe that the role of the Judiciary is not to create legislation; it is to interpret, and that is the role of Congress, and of course, of the framers of the Constitution. I believe it is the job of the Judiciary to interpret the laws as they are passed, not as they would like them to be passed.

The CHAIRMAN. Judge Torruella, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Judge TORRUELLA. Well, of course, that is always a difficult problem. But when we take the oath of office, we take an oath to support the laws and Constitution of the United States, not our subjective feelings on those matters. And I believe that if a situation arises where I have a different opinion than what the laws or Constitution should be, I am bound by my oath of office to follow the laws and Constitution.

The CHAIRMAN. I think those are all the questions I have.

I have a statement here of Carlos Ramiro Barcella, Governor of Puerto Rico. He says:

> I wish to endorse the candidacy of the Honorable Juan Torruella for a judgeship in the First Circuit Court of Appeals. This will be the first occasion on which a Puerto Rican has held such an important and prestigious and important position. It is very important for Puerto Rico, since so many cases on appeal involve a knowledge of the civil law as well as the common law.
>
> Judge Torruella has consistently displayed not only the highest personal and moral qualities, but he has shown a professional capacity for honesty, fairness and courage, as well as a judicial comportment which has done credit to the Federal District court in Puerto Rico and strengthened its integrity and standing in the community."

I have another wire here I would like to read.

> As a member of the Puerto Rican Bar Association, I strongly endorse Judge Torruella for confirmation. He has been an outstanding asset for the U.S. Judiciary. I reject the opposition from the Puerto Rican Bar. I denounce it as nonrepresentative and politically motivated.

This is signed, Hector A. Colon-Cruz, former Solicitor General and Superior Court Judge.

We have a letter here from Congressman Robert Garcia, a Member of Congress from New York's 18th District, endorsing Judge Torruella for the circuit court.

We also have a letter from Lee Gentil of Puerto Rico, endorsing Mr. Torruella for the circuit court.

[Material submitted for the record follows:]

House of Representatives,
Washington, DC, August 8, 1984.

Hon. Strom Thurmond,
U.S. Senate,
Washington, DC.

Dear Senator Thurmond: I understand that the nomination of Juan Torruella, Chief Federal Judge of the Commonwealth of Puerto Rico, is being considered by the Senate Judiciary Committee for the position of Associate Judge for the Circuit Court of Appeals for the First Circuit.

I strongly urge your support of his nomination for this position. He is a man with a strong legal background who has demonstrated his knowledge of the law in his current position as Chief Federal Judge. He is well known for his integrity.

He has fulfilled his tenure as Chief Federal Judge with the highest standards of the legal profession. I am sure that he would fulfill his duties and responsibilities as Associate Judge with the same quality and dedication.

Thank you for your consideration. With best regards, I am

Sincerely,

Robert Garcia, *Member of Congress.*

San Juan, PR, *August 7, 1984.*

Senator Strom Thurmond,
Chairman, U.S. Senate Judicial Committee,
U.S. Senate, Washington, DC.

Dear Senator Thurmond: As a major contributor to the Republican Party, a founding member of the Republican Senatorial Inner Circle, a co-founder of The Republican Presidential Task Force and many other Republican organizations to numerous to mention. I urge you to support and confirm Judge Juan R. Torruella for the Bench at the U.S. Court of Appeals for the First Circuit.

He is honest, hard working and a competent judge.

There will be certain people appearing before your committee who will oppose his confirmation. However, if you look into the background of these people, you will find they have no respect for the Federal Court, nor believe in the jurisdiction of The Federal Court in Puerto Rico. They are un-American and want only independence for Puerto Rico, and some will be communist. I know these people personally, so I am not talking about something I am not sure of.

I urge you, for the United States of America, and for Puerto Rico, to confirm Judge R. Torruella.

Sincerely,

Lee Gentil.

The Chairman. On Tuesday of this week, my office received a call from Mr. Putricia Martinez, executive director of the Puerto Rican Bar Association. Mr. Martinez requested that the president of the bar association, Mr. Arturo Negron-Garcia, be permitted to testify before the committee this morning in opposition to the nomination of Judge Juan Torruella. Mr. Martinez was informed of the time and place of the hearing and advised that Mr. Garcia would be allowed to testify. I would like to note for the record, however, that yesterday, I received a telegram from the bar association, requesting that the hearing be continued until the bar association had an opportunity to present its views to the committee. I do not know if Mr. Garcia is here today. If he is, we will be glad to hear from him at this time.

Is he here?

[No response.]

The **Chairman**. Is there anyone here who opposes this nomination?

[No response.]

The **Chairman**. There appears none.

Now, we have some other witnesses here that we will be glad to hear from, with brief statements, I think, not over 3 minutes each. We would be glad to have you gentlemen come to the table as we call your names.

Arturo Negron-Garcia, Puerto Rican Bar Association, is not here, it seems.

Mr. Goapp, from Chicago, IL. Is he here?

[No response.]

The **Chairman**. Mr. Joaquin A. Marquez, attorney-at-law; Mr. Rafael Capo, attorney-at-law; Mr. Benjamin F. Wilson, attorney, Chapman, Duff & Paul; Mr. Charles Fax, attorney, Doyle and Fax; Mr. Pedro Vazquez, former Secretary of State of Puerto Rico; Mr. Charles Cordero, first vice president, Federal Bar Association, and Mr. Alfonso Christian.

I think I have met most of you gentlemen, and I am very pleased to see you. We appreciate your coming this morning.

Now, are there any other witnesses in behalf of the nominee or against the nominee?

[No response.]

The **Chairman**. There appears none.

We will be glad to hear from you gentlemen as soon as I swear you. If you will just rise and be sworn, that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you, God.

[Response in the affirmative.]

The **Chairman**. We will start at this end of the table, if you would state your name and the law firm you are with and where you are from, and then proceed to make your statement not to exceed 3 minutes.

TESTIMONY OF CHARLES CORDERO, FIRST VICE PRESIDENT, FEDERAL BAR ASSOCIATION, FIRST CIRCUIT, PUERTO RICO, ACCOMPANIED BY ALFONSO CHRISTIAN, PAST PRESIDENT, FEDERAL BAR ASSOCIATION; JOAQUIN A. MARQUEZ, ATTORNEY-AT-LAW, LAW FIRM OF HAMEL & PARK; RAFAEL V. CAPO, DEPUTY GENERAL COUNSEL, EXPORT-IMPORT BANK OF THE UNITED STATES; BENJAMIN WILSON, ATTORNEY-AT-LAW, LAW FIRM OF CHAPMAN, DUFF & PAUL, WASHINGTON, DC, AND CHARLES FAX, ATTORNEY-AT-LAW, DOYLE & FAX, WASHINGTON, DC

Mr. **Cordero**. Thank you, Mr. Chairman.

My name is Charles Cordero. I am first vice president for the First Circuit, Federal Bar Association.

I would like to thank you for the opportunity you have given me to express my endorsement of the Honorable Juan R. Torruella for the position of appellate judge for the First Circuit Court of Appeals.

I am a partner in the law firm of Cordero, Colon & Miranda, with offices in San Juan, PR. I am an American and, of course, a Puerto Rican. I am a member of the Puerto Rico Bar Association and live in Puerto Rico with my family, where I practice law. I am also privileged to be the first vice president of the First Circuit Federal Bar Association.

The Federal Bar Association is an organization that is voluntarily open to all attorneys who are interested in the improvement of the Federal court system, as well as the Federal administrative agency system. As I said before, it is a voluntary organization and has approximately 15,000 members nationwide. The Puerto Rico chapter has an active, voluntary membership of approximately 250 attorneys. I say "voluntary" as opposed to the compulsory membership in the Puerto Rico Bar Association that is required of all lawyers in Puerto Rico before they are allowed to practice law. I dare venture to say that the majority of active Federal practitioners in Puerto Rico are members of the Federal Bar Association.

In the past, the Federal Bar Association has worked very closely with all of the Federal judges in Puerto Rico, as well as many of the Federal administrative law judges that hear cases in Puerto Rico.

Therefore, I believe the Federal Bar Association is in a privileged position to appraise the attitudes and competency of Federal judges.

Today I appear before you in my capacity as first vice president for the Federal bar association to urge confirmation of Judge Torruella to be appellate judge for the First Circuit Court of Appeals.

I have in my folder copies of telegrams or telexes that have been sent to this committee, urging his confirmation. I would like to make them part of the record. They include telexes from Mr. Alfonso M. Christian, who is sitting next to me and who is the immediate past president of the Federal Bar Association, Puerto Rico chapter; Mr. Felix de Jesus, past president of the Federal Bar Association; Mr. Nestor Ramirez Cuebas, the actual president of the Federal Bar Association Puerto Rico Chapter. There is also a telex which I personally sent to the committee in my capacity as first vice president for the First Circuit Federal Bar Association. In addition, I have a telex from Mr. Blas C. Herrero, who is presently in the State of Washington, and cannot be here to testify personally. Mr. Herrero is a former U.S. attorney in Puerto Rico and was also the former Secretary of Justice for Puerto. Mr. Herrero is endorsing confirmation of Judge Torruella.

Many other fellow attorneys in Puerto Rico have come to me personally and have asked me to endorse the confirmation of Judge Torruella.

I have always known Judge Torruella on a professional level. I am quick to point out that while I know him on a professional basis, I do not know him very well socially. That is to say I do not visit his home, nor does he visit mine, but have always been impressed by his credentials, his capacity, and his professionalism. I am, of course, also impressed with his credentials, and his decisive manner and fairness as a Judge.

However, I am not here today to speak in my personal capacity, but as a representative of the Federal Bar Association, Puerto Rico

Chapter. The Federal Bar Association, Puerto Rico Chapter, has authorized me to endorse Judge Torruella for confirmation as appellate judge. The Federal Bar Association favors the confirmation of Judge Torruella because of his experience as evidenced by his 9½ years on the bench. The Federal Bar Association feels that Judge Torruella is decisive, has a full grasp and knowledge of the law; both Federal law, as well as Puerto Rico civil law, which, at times, is quite different from common law.

The Federal Bar Association has been satisfied that all persons that have appeared before Judge Torruella have been assured of equal treatment under law. Judge Torruella is a hard worker, and his opinions reflected crispness, clarity, and conciseness.

In the past, the Federal Bar Association has recognized that there have been adverse reactions to Judge Torruella, especially in cases which some have categorized as political in nature. These adverse reactions from some persons in Puerto Rico, and from some organizations in Puerto Rico, appear to resent the decisive manner in which Judge Torruella has had to rule on very difficult cases, and under very difficult circumstances. Many of the cases involve emotional issues which hinge on the political status of Puerto Rico. At great personal anguish Judge Torruella has had to rule against the interests of these persons and organizations but in every case I feel certain that Judge Torruella has ruled for better constitutional guarantees in Puerto Rico, and in favor of the law, at great personal sacrifice to him and his family.

I believe all members of this committee can appreciate the difficulty Judge Torruella had in deciding a case against a professional organization such as the Puerto Rico Bar Association, knowing that it would create friction between that organization and the person of Judge Torruella. I do not wish to comment on that case because it is pending appellate review at this precise time. However, I cannot leave this committee hearing room without pointing to the fact that the Puerto Rico Bar Association does not represent the vast majority of the views of attorneys in Puerto Rico, especially when it voted to oust from Puerto Rico the U.S. District Court for the District of Puerto Rico.

On behalf of the Puerto Rico Chapter of the Federal Bar Association, I urge this committee to confirm the nomination of Judge Torruella as appellate judge for the First Circuit Court of Appeals. Throughout his life, Judge Torruella has had one foot in Puerto Rico and one foot on the mainland as evidenced by the fact that he received his post high school education at Wharton School of Business, and at the Boston University Law School, and as further evidenced by the fact that he has represented Puerto Rico as a member of the Puerto Rico Olympics team.

Thank you very much for granting me this opportunity to urge confirmation of Judge Torruella.

[Material submitted for the record follows:]

[Telex 1]

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

The undersigned fully endorse immediate confirmation of the Honorable Juan R. Torruella for the First Circuit Court of Appeals. He is a person of integrity, a dedicated untiring Judge, highly qualified, ranks among the very best.

ALFONSO M. CHRISTIAN,
Immediate Past President, Federal Bar Association, P.R. Chapter.
FELIX DE JESUS,
Past President, Federal Bar Association, P.R. Chapter.

[Telex 2]

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

The Federal Bar Association, Puerto Rico Chapter, urges the Senate to confirm the nomination of the Honorable Juan R. Torruella to the United States Court of Appeals for the First Circuit. In the nine years Judge Torruella has served this island as a Federal Judge, he has been consistently impartial and independent in his decisions. As a trial Judge, he is sagacious and unflagging, evenhanded in his rulings and courteous to those who practice the law before him. His integrity and character are beyond question. He possesses the qualifications, in particular the experience and maturity necessary, to perform the demanding functions of a Federal Appellate Judge. Once again, we urge prompt confirmation.

NESTOR RAMIREZ CUEBAS,
President P.R. Chapter, Federal Bar Association.

[Telex 3]

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

The nomination of Honorable Juan R. Torruella for the position of Appellate Judge for the First Circuit Court of Appeals is to be commended. Judge Torruella is decisive, a very hard worker with a keen sense of justice, and has an absolute regard for the protection of our constitutional system of government. He deals firmly with the criminal element of our society while assuring the legal rights of all persons appearing before him are safeguarded. His appointment will be of great benefit to the Appellate Court.

CHARLES A. CORDERO,
First Vice President for the First Circuit, Federal Bar Association.

[Telex 4]

AUGUST 7, 1984.

Hon. Senator STROM THURMOND,
Chairman, U.S. Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: As a former United States Attorney, Attorney General and as Past President of the Federal Bar Association of Puerto Rico I ask you to support as I do, the nomination and confirmation of Judge Juan Torruella to the judgeship to the Court of Appeals for the First Circuit. Judge Torruella has earned the respect and admiration of bench and bar for his judicious administration of his Court and of the cases that comes before him. An attorney who comes before him knows that he may win or may lose but he and his client will get their day in Court before a fair and impartial magistrate who will do justice. Who can ask more of any judge.

As a Puerto Rican I am saddened to lose his wisdom at our District Court. As an American I am proud that his intellectual prowess will contribute in a greater measure to the First Circuit into the American judicial system.

Puerto Rico has never had a judge on a Court of Appeals in the almost 100 years we have been in the Circuit. No more able candidate can be selected to represent us.

I regret not being able to testify personally since I am on a case on the Pacific Court, but respectfully pray that this message be read into the record.

Respectfully,

BLAS C. HERRERO, Jr.

[From the San Juan Star, July 1, 1980]

TORRUELLA—A CLOSER SCRUTINY

(By Harold J. Lidin)

The magazine American Lawyer, a young publication with a circulation of 23,000 and clawing for more, has published an article which lists the worst judge in each U.S. judicial circuit. Author James Cramer labels Juan B. Torruella as the worst judge in the first circuit and one of the worst federal judges in the United States.

Cramer based his choice of Torruella on the latter's handling of the trials of the Vieques anti-Navy demonstrators. The judge's decision to try them separately, instead of jointly, made for bad publicity. Cramer noted. Had the defendants been tried as a group, they could have been dispatched as a group—with less sympathy generated, less martydom won.

On this point Cramer is right; the separate procedure did give the defendants more media exposure.

What is not so clear is why a judge should be rated by how much sympathy his procedures generate for defendants outside the court, the judge's performance inside the courtroom would seem to be more relevant a yardstick.

What is eminently clear is that the author's appraisal of Torruella ignores that judge's overall performance on the bench. For, in important ways, a review of Torruella's work suggests he rates as one of the best federal judges to serve here in the last 30 years.

One quality which Torruella possesses, to an unusual degree, is "righteous indignation." The penchant to be shocked, admittedly can impell a judge to a sometimes impolitic outburst. But when this indignation is sincere, and well-aimed, it can move mountains. Even bureaucrats.

Witness Torruella's performance with regard to that house of horrors known as La Princesa. For generations the jail had been weakening the body and warping the soul of the unfortunates cast into it. Time and again journalists denounced it, Corrections Administration officials be moaned it, nobody did anything about it. Then, in 1976, Torruella visited the jail in connection with a case he was trying.

In his written findings, Torruella stated: "We are compelled to say it has been difficult to hear the evidence in his case without mounting indignation and an overpowering sadness. La Princesa, a misnomer if ever one existed, is a notorious monument to man's inhumanity to man."

Torruella's indignation went beyond the court record. He issued an order obliging penal authorities to reduce La Princesa's population by almost one-half and to transfer out of the place all minors, drug addicts and emotionally disturbed inmates.

Certain bureaucrats, brandishing objections that ranged from logistical alibis to rather precious questions of court jurisdiction, balked at the order. But Torruella pushed for compliance, and won.

This feat, forgotten by the public, is remembered appreciatively by the prisoners rescued from their entombment.

The U.S. District Court of Puerto Rico, understandably, is not known for the suppleness of its English prose. Opinions phrased as movingly as Torruella's comments in the La Princesa case are unusual.

There is another Torruella opinion, the one he wrote in the case of a Greek tanker that spilled oil off of Cabo Rojo, which would be considered outstanding in any US. court. It is a precise, vivid and startingly knowledgeable account of what happened on the bridge of the SS Zoe Colocotronis the night of March 17, 1973.

Torruella, a man who knows about things nautical, put into his ruling a dimension of technical familiarity with the issue seldom found in a court verdict. Torruella produced more than a verdict; he wrote a sea saga. Cramer should read it, for enlightment and for pleasure.

Lawyers for the American Petroleum Institute, surely, have given the Zoe Colocontronis verdict a most careful reading. In fact, industry attorneys are in the Boston Circuit Court seeking to overturn it. For the Torruella verdict goes beyond merely requiring the tanker owners to compensate for cleanup costs; it makes the polluters liable, too, for future enviornmental damages from the spillage.

If the Torruella opinion stands up on appeal, it will establish a precedent that doubtless will be brandished in spillage cases throughout the federal judicial system. The verdict's potential for penalizing the oil industry, and for helping victims of polluters, is enormous.

The treasurers of big oil, anyway, will agree with author Cramer that Judge Torruella is one of the worst judges on a federal bench.

[From the San Juan Star, November 22, 1980]

TORRUELLA SLATES FORT ALLEN VISIT BEFORE RULING ON INJUNCTION REQUEST

(By Tomas Stella)

U.S. District Judge Juan R. Torruella, announced Friday that he will visit Fort Allen sometime next week before he rules on a petition for a permanent injunction on the use of the camp as a refugee center for Cubans and Haitians.

Torruella made the announcement as the plaintiffs in the case, the Commonwealth government and a group of Juana Diaz residents, rested their case in the petition for a permanent injunction.

A preliminary injunction issued by Torruella Oct. 10 was vacated by the 1st U.S. Circuit of Appeals in Boston. The U.S. Supreme Court subsequently upheld the appeals court ruling.

Rather than challenging President Carter's authority to send the refugees here, as they had done at the preliminary injunction hearing, the plaintiffs took a different tack Friday, alleging violations of the Coastal Zone Management Act.

Ramon Martinez Escudero, director of the Planning Board's office of federal affairs, said that no statement claiming that the refugee project was consistent with the federal statute was received by the Commonwealth government until three days ago.

Even this document—a letter from Rear Adm. Arthur K. Knoizen to Secretary of Natural Resources Fred Soltero Harrington—was so vague that it did not comply with requirements, Martinez Escudero said.

The U.S. State Department announced in Washington several days ago that plans to bring refugees to Fort Allen had been temporarily shelved because the number of Cuban and Haitians arriving on the mainland had been reduced drastically.

A representative of the U.S. Justice Department, however, told Torruella in court Friday that the Cuban-Haitian Task Force at the State Department expects a "significant increase" in the Haitian refugees arriving and will postpone placing Fort Allen in "caretaker status" at least until Tuesday.

Torruella did not indicate which day next week he will visit Fort Allen, but he said he wanted to inspect the facilities "at 6 a.m. and at noon."

A ruling on the petition for a permanent injunction is not expected until late next week, at the earliest.

The **CHAIRMAN**. We will be glad to have Mr. Marquez next.

Mr. **MARQUEZ**. I should like to thank the committee, particularly the Chairman, for the opportunity to appear before you in support of Judge Torruella's nomination as Judge of the U.S. Circuit Court of Appeals for the First Circuit.

I appear here today in my capacity as an attorney in private practice and one who has been a member in good standing of the Puerto Rico Bar Association since 1967.

There are several reasons why the Senate should confirm Judge Torruella. No. 1, he is extremely well qualified; second, his record on the Federal Bench during the past 10 years bears eloquent testimony of his suitability; third, his intimate familiarity with the civil law and with the values and mores of the Hispanic community will provide an additional dimension to the first circuit; and fourth, his appointment by President Reagan recognizes the outstanding contribution that Hispanics in general and Puerto Ricans in particular are making to our Nation.

Let me briefly remark as to each of the above points.

First, Judge Torruella is extremely well qualified. He is a graduate of the Wharton School of Commerce and Finance of the University of Pennsylvania; of the Law School of the Boston University; he has just completed a Master of Laws at the University of Virginia and a Master of Public Administration at the University of Puerto Rico. He is even now pursuing additional studies designed to satisfy his educational goals. He is about to publish a book on Federal constitutional jurisprudence affecting Puerto Rico. Prior to his appointment on the Federal Bench, Judge Torruella distinguished himself as a successful trial attorney, principally in the private practice of labor law from 1958 through 1974. This very Committee recognized the merits of Judge Torruella when in 1974, it recommended his confirmation by the Senate to his present position as Judge on the United States District Court for the District of Puerto Rico. In recognition of his achievements, the American Bar Association has found Judge Torruella to be "well-qualified" for his new appointment.

Second, Judge Torruella comes before this Committee not as a stranger, but as a sitting Federal Judge with 10 years of experience, including the last 2 as chief judge of his district. His record is there for all to see. His ability, his judicial temperament, his fairness and his devotion to the principles of that great Constitution which protects all of us are a part of that record. Judge Torruella has never avoided an issue, however fraught with personal peril or loss of popularity. Indeed, his willingness to tackle the tough issues has netted him some detractors, particularly those whose positions found no favor in his decisions.

Some of his more significant decisions include: *Martinez Rodriguez* v. *Jimenez* (1977) in which he closed down one of Puerto Rico's principal penitenciaries due to the inhuman conditions that prevailed there; *United States* v. *Marcano Garcia* (1978) which established the validity of a new Federal law protecting diplomats; *United States* v. *Hayes* (1979) which established the jurisdiction of the United States over U.S. citizens on the high seas involved in the smuggling of drugs; *Romero Barcelo* v. *Harold Brown* (1978) affirmed by the U.S. Supreme Court in 1982 is a landmark case in environmental law. (I should like to note that Judge Torruella, at the request of the parties, donned scuba gear and personally inspected alleged bomb damage to underwater reefs.)

These and other significant decisions have won for Judge Torruella the respect and admiration of many attorneys like myself. They have also garnered for him opposition by certain parties. I truly believe that no one can question his capacity, integrity, dedication, courage, and deep sense of justice.

Third, Judge Torruella will add a new dimension to the fine legal talent now present in the first circuit. As a practicing attorney and judge in Puerto Rico, he has become thoroughly familiar with the civil law concepts and practices so unique to Puerto Rico. His Hispanic roots and values will bring a special sensitivity to the court, which after all receives 20 percent of its caseload from Puerto Rico.

Fourth, finally, I believe President Reagan's appointment of Judge Torruella is not only a well-deserved honor for the judge, but a fitting tribute to all Hispanics in recognition of their continuing contribution to the life of our Nation. Judge Torruella is the first Puerto Rican ever nominated to a circuit court of appeals. It is my earnest hope that President Reagan and all others who may follow him in future years will continue to enrich our Federal judiciary by appointing qualified Hispanics and other minorities.

The appointment of Judge Torruella will mark an historic occasion. It will engender a sense of pride among the people of Puerto Rico. For the first time since Old Glory began waving over our shores, a Puerto Rican will be sitting in the Federal Circuit Bench. Another vestige of the basic inequality which residents of Puerto Rico must bear will have been eliminated. The knowledge that one of us will sit in judgment along with the sons of Massachusetts, Maine, and New Hampshire will enhance our true participation in the administration of Federal justice. Judge Torruella is a credit to himself, to you and to the American judiciary; he is deserving of your support.

Accordingly, I urge that your committee recommend to the full Senate that Judge Juan Torruella be confirmed as a judge of the U.S. Circuit Court of Appeals for the First Circuit.

The CHAIRMAN. Thank you very much.

Mr. MARQUEZ. Thank you, Senator.

The CHAIRMAN. Any statements or letters—I believe Mr. Cordero had some—we will place those in our files of the record. Please give those to Mr. Duke Short for our records.

Next, we have Mr. Capo. We will be glad to hear from you.

Mr. CAPO. Mr. Chairman, thank you very much.

My name is Rafael V. Capo, and I am the Deputy General Counsel of the Export-Import Bank of the United States. As a former deputy legal counsel to the Vice President of the United States from 1981 to 1983, I was intimately involved with the process of nomination of Federal judges to the Federal District Court of Puerto Rico. In addition, I have been a practicing lawyer in the District of Puerto Rico, besides Washington, DC.

I respectfully come before this honorable committee to present my firmest support for the nomination confirmation of Chief Judge Torruella to the U.S. Court of Appeals for the First Circuit. Judge Torruella is the chief judge of the U.S. District Court for the District of Puerto Rico and has been a judge for approximately 10 years. He has served in the judiciary with a high sense of courage, determination, and integrity.

Judge Torruella was a practicing lawyer for over 15 years before becoming a judge for the last 10 years. Demonstrating his concern for continuing the improvement of his legal skills, he has completed a master's degree in the judicial process, recently, at the prominent and scholarly University of Virginia Law School.

The high standards that govern his court are well known to practitioners. He has been firm and definitive in times of controversy and turbulence; he has developed a reputation of respect and character, and has consistently imparted justice to every group coming before the court, upholding the U.S. Constitution.

I commend the President for this excellent choice. It is an historic nomination, for both the United States as a nation and for Puerto Rico as part of this great country. It is for me an honor and an immense privilege to wholeheartedly endorse Judge Torruella to the U.S. Court of Appeals for the First Circuit.

Thank you.

The CHAIRMAN. Please state your name and the law firm you are with, and then you may proceed.

Mr. WILSON. Thank you. Good morning, Mr. Chairman.

My name is Benjamin Wilson. I am a trial attorney with the law firm of Chapman, Duff & Paul. My legal practice consists primarily of Federal court litigation. As a trial attorney in private practice and with the U.S. Department of Justice, I have appeared in Federal courts throughout the country. I am a member of the State bar of Georgia and the bar of the District of Columbia.

Over the course of the 2 years that I have been associated with the Washington, DC, and San Juan, Puerto Rico-based law firm of Chapman, Duff & Paul, I have become chiefly responsible to defending and appearing in court on behalf of the Puerto Rico Aqueduct & Sewer Authority in two major environmental law cases. In both matters, the Government has alleged that PRASA has violated provisions of the Clean Water Act, its predecessor act, the Federal Water Pollution Control Act Amendments of 1972, and the natinal pollutant discharge elimination system permits issued to PRASA for the operation of the wastewater plants. The responsibility of presiding over these cases has demanded Judge Torruella's ongoing supervision and monitoring of PRASA's compliance with the act and with the permits.

These cases have raised not simply complex questions of interpretation of the Clean Water Act as adopted by the Congress, but have forced the parties and the court to devise novel solutions to ensure that the oftentimes costly problems of wastewater treatment in Puerto Rico are remedied to the fullest extent possible. In this regard, Judge Torruella has undertaken yeoman efforts to strike a proper balance between the interests of settlement and justice under the law. He has often urged the parties to pursue practical, pragmatic settlement solutions, while at the same time remaining ready and willing to hear and decide the merits of any given motion and enforce the law accordingly.

Similarly, Judge Torruella has been quick to ensure that PRASA will be given due process, will have its day in court, and will not be found in violation of the law on the sole basis of newspaper reports or political sentiment. At the same time, Judge Torruella has made certain that he is aware of PRASA's success in complying with the Clean Water Act and the permit provisions by appointing a monitor to report on PRASA's compliance efforts. He has also been careful to ensure that the prosecution of these cases is not delayed.

With repsect to the hearings and conferences held in the cases to date in which I have been in attendance, Judge Torruella has taken great pains to be evenhanded in his judgment.

The CHAIRMAN. Your time is up but we will place your entire statement in the record.

Mr. WILSON. Mr. Chairman, if I might state, as several of the other gentlemen have stated, I have also brought with me this morning several written statements, letters, from partners in our law firm which we would like to be made a part of the record.

The CHAIRMAN. Would you turn those over to Mr. Duke Short on the committee staff for our records?

Mr. WILSON. Yes, sir.

[Material submitted for the record follows:]

PREPARED STATEMENT OF BENJAMIN F. WILSON

Good morning Mr. Chairman and members of the Committee. I am appearing before this Committee this morning in support of the nomination of the Honorable Juan R. Torruella, Chief Judge of the United States District Court for the District of Puerto Rico, for a seat on the United States Court of Appeals for the First Circuit.

My legal practice consists primarily of federal court litigation. As a trial attorney in private practice, and with the United States Department of Justice, I have appeared in federal courts throughout the country. I am a member of the State Bar of Georgia and the Bar of the District of Columbia.

Gradually, over the course of the two years that I have been associated with the Washington, D.C. and San Juan, Puerto Rico based law firm of Chapman, Duff and Paul, I have become chiefly responsible for defending and appearing in court on behalf of the Puerto Rico Aqueduct and Sewer Authority (PRASA) in two major cases brought by the United States: *United States* v. *Puerto Rico Aqueduct and Sewer Authority*, No. 78-0038 (D. P.R., filed on January 12, 1978); and *United States* v. *Puerto Rico Aqueduct and Sewer Authority, et al.*, No. 83-0105 (D. P.R., filed on January 20, 1983). In both matters the Government has alleged that PRASA has violated the provisions of the Clean Water Act ("Act"), 33 U.S.C. Section 1251, et seq., its predecesor, the Federal Water Pollution Control Act Amendments of 1972, and the National Pollutant Discharge Elimination System ("NPDES") permits issued to PRASA for the operation for the wastewater plants in question. The responsibility of presiding over these cases has demanded Judge Torruella's ongoing supervision and monitoring of PRASA's compliance with the Act and the NPDES permits.

These cases have raised not simply complex questions of interpretation of the Clean Water Act, as adopted by Congress, but have forced the parties and the Court to devise novel solutions to insure that the oftentimes costly problems of wastewater treatment in Puerto Rico are remedied to the fullest extent possible. In this regard, Judge Torruella has undertaken yeoman efforts to strike a proper balance between the interests of settlement and justice under the law. Specifically, he has often urged the parties to pursue practical, pragmatic settlement solutions, while at the same time remaining ready and willing to hear and decide the merits of any given motion and enforce the law accordingly.

Similarly, Judge Torruella has been quick to insure that PRASA will be given due process, will have its "day in court", and will not be found in violation of the law on the sole basis of newspaper reports or political sentiment. At the same time, Judge Torruella has made certain that he is aware of PRASA's success in complying with the Clean Water Act and the NPDES permit provisions by appointing a Monitor to report on PRASA's compliance efforts. He has also been careful to insure that the prosecution of these cases is not delayed.

With respect to the hearings and conferences held in the aforementioned cases to date, Judge Torruella has taken great pains to be evenhanded in his judgments. His decisions are not simply well written but are well reasoned. Furthermore, Judge Torruella's judicial temperament has been exemplary. He permits counsel to present their arguments thoroughly, and reaches a decision promptly, after making a careful, considered judgment.

One final aspect pertaining to Judge Torruella's nomination bears special mention. As the members of this Committee are no doubt aware, Puerto Rico is a civil code jurisdiction. Based on my past experience with cases under the Civil Code of Puerto Rico, I can understand the special difficulties which the judges of the United States Court of Appeals for the First Circuit must have when required to address questions concerning the interpretation of the Civil Code. To be sure, those lawyers trained to analyze and interpret this common law are often plagued by the special, unexpected requirements of a civil code jurisdiction. While the First Circuit has always done a fine job of interpreting the Civil Code of Puerto Rico, based on his ten years of experience on the Federal bench and his many years in private practice, Judge Torruella would most assuredly be an asset to the court in interpreting questions under the Civil Code.

For the foregoing reasons, I respectfully urge that Judge Juan R. Torruella's appointment to the United States Court of Appeals for the First Circuit be confirmed.

CHAPMAN, DUFF & PAUL, *August 8, 1984.*

The SENATE COMMITTEE ON THE JUDICIARY,
Senate Dirksen Office Building,
Washington, DC.

CHAIRMAN THURMOND AND HONORED MEMBERS OF THIS COMMITTEE: My name is Luis Guinot, Jr. of the law firm of Chapman, Duff and Paul and I submit this written statement to you to strongly endorse the nomination of Chief Judge Juan R. Torruella del Valle of Puerto Rico as a Judge for the United States Court of Appeals for the First Circuit. As a lawyer who has often appeared before the United States District Court for the District of Puerto Rico, I can confidently attest to the high standards Chief Judge Torruella brings to the bench. I have always found him to be well prepared and eager to give a fair hearing to all sides. He is a sound jurist, possessing a formidable combination of intellect, practical legal experience and fairness. The credentials of this gentleman are exemplary and he has won the confidence of the many attorneys who have been fortunate enough to practice before him. One need only look at his previous record to realize that he is highly qualified for the position for which he has been nominated.

I especially welcome this nomination as it is my firm belief that Judge Torruella meets the standard of excellence we have come to expect of our federal judiciary. I am confident that he will continue to uphold the integrity of the judicial system and will be a jurist of great distinction.

I cannot speak highly enough of Judge Torruella's qualifications and hope that this Committee sees fit to confirm him.

Respectfully,

LUIS GUINOT, Jr.

CHAPMAN, DUFF & PAUL,
Washington, DC., August 8, 1984.

Re Nomination of Chief Judge Juan R. Torruella.

Senator STROM THURMOND,
Chairman, Committee on the Judiciary
Senate Dirksen Office Building, Washington, DC.

DEAR SENATOR THURMOND: I am a partner in the law firm of Chapman, Duff and Paul, which has law offices in Washington, DC. and San Juan, Puerto Rico. I write to express my support for the nomination of Chief Judge Juan R. Torruella of the United States District Court for the District of Puerto Rico to be a judge of the United States Court of Appeals for the First Circuit.

My practice consists primarily of federal court litigation, including several cases in the District of Puerto Rico. Although I have never personally appeared before Chief Judge Torruella, I have supervised two major cases before him (United States v. Puerto Rico Aqueduct ans Sewer Authority, C.A. No. 78-0038 (TR) and United States v. Puerto Rico Aqueduct and Sewer Authority and the Commonwealth of Puerto Rico, C.A. No. 83-0105 (TR)). These cases involve the Aqueduct Authority's compliance with regulations and orders issued under the Federal Clean Water Act.

Chief Judge Torruella has managed these complex and, at times, difficult cases in a sound, efficient manner, and has permitted the parties a fair opportunity to present and litigate their petitions. In his approach to the many issues presented, chief Judge Torruella has demonstrated a sound judicial temperament and outstanding legal ability. His decisions have been well reasoned and he has been particularly helpful to the parties in facilitating their settlement efforts.

I believe that Chief Judge Torruella's nomination is an excellent one, and the he will render exemplary service as an appellate judge. Accordingly, I urge that he be confirmed.

Very truly yours,

WILLIAM HUTCHINS.

The CHAIRMAN. Our last speaker is Mr. Charles Fax. Mr. Fax, would you give your name, the firm you are with, and where you are from?

Mr. FAX. Thank you, Mr. Chairman.

My name is Charles Fax. I am a member of the Washington, DC law firm of Doyle & Fax, specializing in criminal and civil corporate tax and commercial litigation. I am admitted to the bars of New York and the District of Columbia, and I have practiced in Federal trial and appellate courts throughout the United States.

I appear this morning before the Committee on the Judiciary to endorse the nomination of Judge Torruella for elevation to a seat on the U.S. Court of Appeals for the First Circuit.

Prior to March 1, 1984, I was a partner in the Washington, DC and San Juan, PR, law firm of Chapman, Duff & Paul, and while with that firm, I was the senior partner in charge of litigation. In that capacity, over a number of years, I appeared before most of the U.S. district judges sitting in the District of Puerto Rico, including Chief Judge Torruella. I had the opportunity to observe Judge Torruella both as a motions judge and as a trial judge. As motions judge, Judge Torruella was always prepared on the facts of each case, notwithstanding a large number of matters before him on any given day. He had and exercised the ability to quickly dispose of complex matters in a fair, informed, and judicious manner. In my experience, all parties left his motions court satisfied that they had had a fair opportunity to present their claims and receive a hearing.

I also appeared before Judge Torruella as chief trial counsel on behalf of the Puerto Rico Aqueduct and Sewer Authority in the cases of which my former colleague to my right, Mr. Wilson, spoke. Invariably, when the parties entered Judge Torruella's courtroom, we found him fair, courteous, even-handed, and well-informed on the specific disputes then before him.

The predicate allegations of the Government in these related environmental lawsuits gave rise to high emotion, adverse publicity, and the opportunity for politicization. Notwithstanding the volatility of the situation surrounding these claims, Judge Torruella was able to maintain a firm and balanced hand on the development of the case so as to minimize the risk of prejudice to any party. In my opinion, his actions throughout my representation in his courtroom were a model of judicial temperament.

I strongly endorse the nomination of Judge Torruella for elevation to the U.S. Court of Appeals for the First Circuit, and I urge this committee to act affirmatively in this regard.

Thank you, Mr. Chairman, for the opportunity to appear this morning.

[Material submitted for the record follows:]

Prepared Statement of Charles S. Fax

Mr. Chairman and members of the committee, my name is Charles S. Fax, Esq. I am a member of the Washington, D.C. law firm of Doyle and Fax, specializing in criminal and civil corporate, tax and commercial litigation. I am admitted to the Bars of New York and the District of Columbia and have practiced in Federal trial and appellate courts throughout the United States. I appear this morning before the Committee on the Judiciary of the United States Senate to endorse the nomination of the Honorable Juan Torruella, Chief Judge of the United States District Court for the District of Puerto Rico, for elevation to a seat on the United States Court of Appeals for the First Circuit.

Prior to March 1, 1984 I was a partner in the Washington, D.C. and San Juan, Puerto Rico law firm of Chapman, Duff and Paul. While at that firm, I was senior partner in charge of litigation.

In that capacity, over a number of years, I appeared before most of the United States district judges sitting in the District of Puerto Rico, including Chief Judge Torruella. I had the opportunity to observe Judge Torruella both as a motions judge and as a trial judge. As motions judge, Judge Torruella was always prepared on the facts of each case, notwithstanding the large number of matters before him. He had, and exercised, the ability to quickly dispose of complex matters in a fair, informed and judicious manner. In my experience, all parties left his motions court satisfied that they had a fair opportunity to present their claims and receive a hearing.

I also appeared before Judge Torruella as chief trial counsel on behalf of one client in two related lawsuits. Those suits were denominated *United States of America* v. *Puerto Rico Aqueduct and Sewer Authority (PRASA),* Civil Action No. 78-0038 and *United States* v. *Puerto Rico Aqueduct and Sewer Authority (PRASA) and The Commonwealth of Puerto Rico,* Civil Action No. 83-0105. In both cases, the United States Environmental Protection Agency alleged that PRASA, our firm's client, had violated numerous provisions of applicable Federal anti-pollution regulations. In the former case, EPA also alleged substantial violations by PRASA of a broad consent decree into which PRASA had entered with EPA in resolution of alleged underlying violations of Federal anti-pollution regulations. Both of these cases were vigorously contested during my service as principal trial counsel for PRASA, requiring briefings and hearings from time to time before Judge Torruella.

Invariabley, when the parties entered Judge Torruella's courtroom, we found him fair, courteous, even-handed and well informed on the specific disputes then before him. The predicate allegations of the government in these related lawsuits gave rise to high emotion, adverse publicity and the opportunity for politicization. Notwithstanding the volatility of the situation, Judge Torruella was able to maintain a firm and balanced hand on the development of the case so as to minimize the risk of prejudice to any party. In my opinion, his actions throughout were a model of judicial temperament. I strongly endorse the nomination of Judge Torruella for elevation to the United States Court of Appeals for the First Circuit and I urge this Committee to act affirmatively in this regard.

Thank you for the opportunity to appear this morning.

The CHAIRMAN. Thank you very much.

I want to thank all you gentlemen who have appeared here and testified in behalf of Judge Torruella.

Now, Mr. Alfonso Christian is here, and I wonder if he has a few words he wants to say.

Mr. CHRISTIAN. My expressions are in the record and are part of the appendices provided by my colleague, Mr. Cordero.

The CHAIRMAN. We are very pleased to have you with us.

Mr. CHRISTIAN. I fully endorse the confirmation of Judge Torruella to the court of appeals, and I have stated so in writing.

The CHAIRMAN. Thank you very much.

We are very pleased to have all of you here.

Mr. Capo, did you have something else?

Mr. CAPO. Yes; I just wanted to make sure, Mr. Chairman—there is a telex that was not mentioned before from Jose H. Pico, who is a past-president of the Puerto Rico Bar Association from 1974 to 1976. He asked me to specifically make sure that if the telex has not come in, that he wanted to express his firm endorsement for Judge Torruella.

The CHAIRMAN. Thank you very much.

I want to thank all of you for coming and showing your interest in this fine appointment. You are now excused.

Judge Torruella, that completes the hearing, and we now stand adjourned.

[Whereupon, at 9:13 a.m., the committee was adjourned.]

BIOGRAPHIES

CYNTHIA HOLCOMB HALL

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: February 19, 1929, Los Angeles, CA.

Legal residence: California.

Marital status: Widow, 2 children.

Education: 1947-48—University of Geneva; 1948-51—Stanford University, A.B. degree; 1950-51—Stanford University Law School; 1951-53—George Washington University, Law School; 1953-54—Stanford University Law School LL.B. degree; 1959-60—New York University Law School, LL.M degree.

Bar: 1954—Arizona; 1956—California.

Military service: 1951-53—U. S. Navy. Lieutenant (j.g.).

Experience: 1955-59—Generally did not practice law, married with young child—pro bono publico basis Legal Aid, Phoenix, AZ—Referee, Juvenile Court in Phoenix; 1959—Valley National Bank, trust department attorney; 1959-64—Department of Justice, tax division; trial attorney; 1964-66—Treasury Department, Office of Tax Legislative Counsel, attorney-advisor; 1966-72—Brawerman & Holcomb, partner, Beverly Hills, CA.; 1972-1981—U.S. Tax Court Judge; 1981 to present—U.S. District Judge, Central District of California.

EMORY M. SNEEDEN

NOMINEE, U.S. CIRCUIT JUDGE, FOURTH CIRCUIT

Birth: May 30, 1927, Wilmington, NC.

Legal residence: South Carolina.

Marital status: Married to Margie J. Carden Sneeden, 2 children.

Education: 1947-49—Wake Forest University B.S. degree; 1948-50—Wake Forest University School of Law, J.D. degree 1953.

Bar: 1953—South Carolina.

Military Service: 1945-46—(Active) U.S. Army; 1949-50—(Reserve); 1951-55—(Active) Infantry; 1955-75—(Active) Judge Advocate General Corps, (Brigadier General, retired).

Experience: 1975-78, 1979, 1980 and 1981—Judiciary Committee U.S. Senate: Minority Counsel, Subcommittee on Antitrust and Monopoly (1976-77), Minority Chief Counsel and Staff Director, Subcommittee on Antitrust and Monopoly (1977-79), Chief Minority Counsel, Committee on the Judiciary (1978-80), Chief Minority Counsel and Chief Counsel, Committee on the Judiciary (1980-81); 1978-79—Randall, Bangert & Thelen, Counsel; 1978-82—University of South Carolina School of Law, associate dean; 1981 to present—McNair, Glenn, Konduros, Corley. Singletary, Porter & Dibble, P.A., counsel (1981-1982), shareholder (1982-present).

JUAN R. TORRUELLA

NOMINEE, U.S. CIRCUIT JUDGE, FIRST CIRCUIT

Birth: June 7, 1933, San Juan, PR.

Legal residence: Puerto Rico.

Marital status: Married to Judith L. Wirt Torruella, 4 children.

Education: 1950-54—University of Pennsylvania, Wharton School of Business and Finance B.S. degree; 1954-57—Boston University School of Law, LL.B. degree.

Military service: 1949-51—U.S. Naval Reserve.

Bar: 1958—Puerto Rico.

Experience: 1957-58—Law clerk for Associate Justice, Pedro Perez Pimentel, Supreme Court of Puerto Rico; 1958-60—National Labor Relations Board, Region 24 attorney; 1960-67—Fiddler, Gonzalez & Rodriguez, Associate (1960-1963), Partner (1963-1976); 1967-69—Private practice, Hato Rey, PR; 1969-74—Pieras & Torruella, partner; 1975 to present—U.S. District Judge, District of Puerto Rico.

CONFIRMATION HEARING ON:

CHARLES E. WIGGINS AND FRANK H. EASTERBROOK

WEDNESDAY, SEPTEMBER 5, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The full committee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Robert J. Short, chief investigator; and Allan Spence, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We meet this morning to consider the nominations of two Federal judges; one, Frank H. Easterbrook, of Illinois, to be U.S. circuit judge for the seventh circuit, and Charles E. Wiggins, of Virginia, to be U.S circuit judge for the ninth circuit.

We will ask both of you gentlemen to stand, raise your hands, and be sworn.

Do you solemnly swear that the testimony you shall give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. EASTERBROOK. I do.

Mr. WIGGINS. I do.

The CHAIRMAN. Please be seated.

Senator Dole was planning to be here and speak on behalf of Mr. Wiggins. He may not be able to come, but he will send a statement, I understand, in your behalf, Mr. Wiggins.

Now, do you know if Senator Percy is in town, or is he planning to come?

Mr. EASTERBROOK. No, Senator. He is in Illinois.

The CHAIRMAN. He will send a statement, I am sure, if you will kindly call his office. I imagine he recommended you.

Mr. Wiggins, would you please come to the table?

TESTIMONY OF CHARLES E. WIGGINS, NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

The CHAIRMAN. Mr. Wiggins, you have your wife with you, I believe, so you might introduce her and any other family or friends you have present.

Mr. WIGGINS. Senator, this is my wife, Betty.

The CHAIRMAN. Mrs. Wiggins, we are very pleased to have you with us.

Mr. WIGGINS. She is my only family member present.

The CHAIRMAN. Are there any friends you would like to introduce?

Mr. WIGGINS. Yes. I would like to introduce Jim Atkin, a partner in my law firm, Pillsbury, Madison & Sutro. I would like to think there are other friends here, too, but maybe not such close friends.

The CHAIRMAN. Now, without objection, we will put your résumé in the record. I believe it shows that you are married and have five children.

Mr. WIGGINS. Yes, sir.

The CHAIRMAN. It also shows that you were educated at the University of Utah and Pasadena City College, the University of Southern California and the University of Southern California School of Law; is that right?

Mr. WIGGINS. Yes, sir.

The CHAIRMAN. And you served in the Army for 3 years, from 1945 to 1948.

And your experience as a lawyer is shown on your résumé, so I will not go into detail, but will just place that in the record.

Mr. Wiggins, when were you elected to Congress and how long did you serve?

Mr. WIGGINS. Senator, I was elected in 1966, took my seat in January 1967, and served consecutively for 12 years.

The CHAIRMAN. You have been a practicing attorney, I believe, since 1957, and you served approximately 12 years, I believe you said, in Congress.

Now, you have been nominated for the position of circuit court judge for the Ninth Circuit Court of Appeals. What do you feel would be the most rewarding aspects of serving in this capacity?

Mr. WIGGINS. Senator, I am a lawyer. My life and my love has always been law. This nomination, if confirmed by the Senate, will give me an opportunity to fulfill an objective of participation in a system which, when it works—and it can—provides equal justice for all.

The CHAIRMAN. Mr. Wiggins, as I previously mentioned, you were formerly a member of Congress, where you served on the House Judiciary Committee, I believe.

Mr. WIGGINS. Yes, sir.

The CHAIRMAN. And at various times, on other committees and subcommittees.

You also served on the National Commission for the Revision of the Federal Code Appellate System, did you not?

Mr. WIGGINS. Yes.

The CHAIRMAN. Mr. Wiggins, with this background, do you believe changes in the law should be reserved to the legislature, whose members can be altered by the voters if the elected officials fail to realize the value to society?

Mr. WIGGINS. Yes, of course, Senator. My service, 12 years in Congress, and prior to that, as a city councilman, as a member of a legislative branch, has taught me to be extraordinarily sensitive to the prerogatives—jealous of the prerogatives—of the legislative branch.

The CHAIRMAN. Now, in response to a portion of the committee questionnaire concerning judicial activism—and I am very interested in that subject—you stated:

> As a matter of judicial management, in recognizing the limits of judicial competence, courts should intrude into the administrative details of Executive functions only to the extent necessary to ensure compliance with its laws.

What are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. WIGGINS. Senator, the key word in the answer which I gave is lawful. That is to say, the order in the first instance must be lawful. That is a difficult question, but it is the essence of the matter. The law, then, is the standard.

If the court has the power and must act in the first instance, then it obviously should ensure that its lawful, proper orders are complied with. The function of an appellate court would be to approve the exercise of jurisdiction properly applied by a lower court in securing compliance with its lawful orders.

However, the essence of the matter, Senator, is whether the order is lawful in the first instance. Obviously, I could not comment on that generally, because it depends upon each case.

The CHAIRMAN. Mr. Wiggins, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Mr. WIGGINS. I would have no trouble with that, Senator. A judge does not proclaim the laws for the United States. They are found in the statutes and in the Constitution of the United States, and I will follow them whatever my personal predeliction may be.

The CHAIRMAN. As I stated, I am especially interested in this question of judicial activism, and I have seen some Federal judges who have taken over school districts and hospitals and other State institutions. And it really frustrates me when a judge does that, because of all people who ought to adhere to federalism, I think it ought to be a Federal judge. And the Constitution, I think, is clear that all powers not delegated to the Union are reserved to the States; and a lot of these matters have not been delegated to the Union.

Are you a strong believer in federalism? Do you believe the Constitution says what it means and means what it says?

Mr. WIGGINS. Of course, Senator. I am probably more a federalist than I am a Republican, but I will not pick and choose. I believe strongly in the principle of federalism.

The CHAIRMAN. We have letters here from—I assume Senator Wilson recommended you?

Mr. WIGGINS. I have not read his letter, but he stated to me that he would recommend my nomination.

The CHAIRMAN. I understand he supports you.

Mr. WIGGINS. I would be shocked if he did not.

The CHAIRMAN. He sent in a blue slip, approving your nomination. And I believe so did Senator Cranston. Senator Dole, and Congressman Rodino, I believe, have written letters in your behalf, and we will place all of those in the record, without objection.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

I am very pleased that my friend and longtime colleague, Charles E. Wiggins, has been nominated for appointment to the Ninth Circuit Court. He has my strong support. Chuck Wiggins has had a distinguished career in public service as well as in private practice of the law. While his accomplishments in both areas have been impressive, he is perhaps best known for his service on the House Judiciary Committee during the Watergate hearings. At that time the entire nation had the opportunity to see Congressman Wiggins, a lawyer staunch in his loyalty to the President, eloquent in defense of what he believed was right, yet able to face unanticipated events with a judicious temperament.

As a Californian, I am particularly gratified by the nomination of a native Californian to the Ninth Circuit. Chuck's knowledge of California's special problems and the widespread respect he has among attorneys and judges in our state will serve him well on the appellate court bench.

While a complete review of Chuck Wiggins' life would take many pages of testimony, I am struck with a characteristic which comes through time and time again during his career: his personal integrity. He has the kind of tough adherence to a moral code one looks for in an appellate judge: an integrity unassailable by political considerations; an integrity which, even when I opposed him on issues before the Congress, I could not help but notice and respect.

I am delighted with Chuck Wiggins' nomination and confident that he will be a wise and able juror. I recommend to the Judiciary Committee his approval and speedy confirmation by the U.S. Senate.

PREPARED STATEMENT OF SENATOR PETE WILSON

Mr. Chairman, today the committee considers the nomination by the President of the United States of the Honorable Charles E. Wiggins to serve as United States Circuit Judge for the Ninth Circuit Court of Appeals. As a fellow Californian, I am honored to endorse this excellent selection.

Here in Washington, D.C., we prehaps know Chuck Wiggins best for his six distinguished terms as a Member of the United States House of Representatives from the Los Angeles area. Congressman Wiggins was an active participant in legislation relating to Constitutional amendments, civil rights, bankruptcy, anti-trust, copyright, and patent laws. He served with distinction, not only on the Judiciary Committee of the other body, but on several select and ad hoc committees on matters of direct relevance to lawyers and judges. His experience with the making of laws is, therefore, significant.

Mr. Wiggins' extensive public service also includes being Mayor of the city of El Monte and Chairman of its Planning Commission. He has participated in many symposia on judicial administration and, in fact, now is a member of the Advisory Committee on Federal Civil Rules of Procedure.

Chuck Wiggins earned the right of public service by demonstrating his impressive command of the law through a decade of private practice in his home town of El Monte, both as sole practioner and partner of the highly regarded firm of Wood & Wiggins. He is a product of El Monte's public schools and the University of Southern California School of Law, where he made Law Review.

In short, Mr. Chairman, Charles Wiggins is well respected and admired by attorneys, public officials, and private citizens on both the East and West Coast. The President has now called upon him to serve on the Court of Appeals for the Ninth Circuit. I think we can be pleased to have a Circuit Judge of such high caliber and broad experience as Charles Wiggins, who will reflect strong credit upon himself as well as the Court. I urge prompt Committee approval and Senate confirmation.

PREPARED STATEMENT OF SENATOR ROBERT DOLE

Mr. Chairman, it is not often that this committee has the opportunity to consider one of its own for elevation to the Federal bench. And yet, at the present time we are afforded the chance for two such individuals. Emory Sneeden, the former chief of this committee, has already had his confirmation hearing last month; this afternoon we are pleased to consider the qualifications of Chuck Wiggins.

Forgive me, Mr. Chairman, for using the familiar form of address, for such a distinguished individual. However, I do so on the basis of a long and fruitful association with him. Chuck and I served together in the House of Representatives. I had many close contacts with him at that time and have been privileged to maintain these relationships in the intervening years. This firsthand knowledge of the man has led me to form certain opinions about him which I would now like to briefly share with this committee.

First and foremost is his unquestioned and absolute integrity. In his public and private life he has attained and enjoyed a reputation which is the exemplar for all who serve in the public service.

Second, is his competence. As a former Member of Congress and a private practitioner of law, he has been involved in an array of public policy and legal matters that encompass an almost unbelievable scope. I recall, quite vividly, his one-man crusade to reform and streamline the Federal law relating to seizures and confiscations. This issue which has been exceedingly complex and complicated has received scant attention from legal commentators or the profession. Yet Mr. Wiggins felt that reforms were needed and proceeded to get long overdue changes enacted into law. At the other extreme, Mr. Wiggins was at the center of the Watergate investigation where he received nationwide attention for his fair and skillful conduct in that inquiry. These two extreme examples illustrate the measure of this lawyer and the depth of his legal interests.

Finally, Mr. Chairman, I want to comment on this man's love for the law. To my knowledge this nominee is the first former politician who has received an exceptionally qualified rating from the American Bar Association's Review Committee. This evaluation from his peers is a tribute to his legal interests, skills and experience. I recall a conversation held at least 10 years ago in which Chuck Wiggins expressed his interest in serving on the Federal appellate bench. He indicated that this would indeed be the capstone of his public and legal aspirations. This interest made a deep impression on the Senator from Kansas although it certainly did not change my career objectives and aspirations. Only a man deeply committed and involved with the law as Chuck has been could place his goals in such a perspective.

It is for these reasons, Mr. Chairman, that I urge the committee to act promptly in approving this nominee. I will do all that I can to ensure that the Senate also gives its advise and consent and speedily confirms Charles Wiggins for the ninth circuit.

PREPARED STATEMENT OF REPRESENTATIVE PETER W. RODINO, JR.

I submit this statement in support of the confirmation of the nomination of Charles E. Wiggins for a position as Judge of the 9th Circuit Court of Appeals.

As a Member and Chairman of the House Committee on the Judiciary, I served in the House of Representatives and on the House Committee on the Judiciary with Charles E. Wiggins during his entire period of service from 1967 to 1979.

While it can truthfully be said that we rarely voted together, it must also be said that we frequently worked together. Worked together as lawyers and legislators to make certain that the language of the law we were considering was clear and workable.

During those years of service together I came to respect Charles Wiggins' ability as a lawyer. He was always a thoughtful and precise contributor to the deliberations of the Committee. While he was an articulate advocate, his arguments frequently served to sharpen the focus of his opponents and ultimately to sharpen our focus on the issue involved.

During all of his service in the House of Representatives, Charles Wiggins was a thoroughly honorable man, a colleague whose word could be trusted. Who observed the rules of decorum, the rules of civility, the rules of fairness, and the rules of the House.

Chuck also displayed a propensity for listening to all sides of an argument before making up his mind. He would on occasion seek additional facts or stir up arguments to test his own conclusions.

I believe that the qualities displayed by Charles Wiggins during his service on the Committee are the qualities which will serve him well in his service on the Federal bench.

The **Chairman**. I think those are all the questions we have. I hope you enjoy your service on the bench.

Mr. **Wiggins**. I hope I have that privilege, Senator.

Thank you.

The **Chairman**. Thank you very much. You are excused now.

Now, Mr. Easterbrook, if you will come forward, please.

TESTIMONY OF FRANK H. EASTERBROOK, NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT

The **Chairman**. Do you have any friends or family here that you would like to introduce?

Mr. **Easterbrook**. Yes, Senator, thank you. I would like to introduce my brother, Gregg, and a friend, John Cooney, who was a classmate of mine in law school.

The **Chairman**. We are glad to have you.

You are living in Illinois now, but you were born in Buffalo, NY, I believe.

Mr. **Easterbrook**. Yes, Senator.

The **Chairman**. You went to Swarthmore College and you got your law degree from the University of Chicago; is that right?

Mr. **Easterbrook**. Yes.

The **Chairman**. And your residence now is where?

Mr. **Easterbrook**. My residence is Chicago, IL, Senator.

The **Chairman**. And are you still serving as a professor of law at the University of Chicago?

Mr. **Easterbrook**. Yes, I am, Senator.

The **Chairman**. And you are also practicing law?

Mr. **Easterbrook**. Yes. I have a substantial appellate practice in addition to my being a professor of law.

The **Chairman**. You heard the questions that I just asked Mr. Wiggins. I would like to know how you stand on this question of Federalism.

Mr. **Easterbrook**. Senator, I believe that federalism is very important. It is part of the premise on which the Union was founded, and I am a strong supporter of Federalism and would be so as a judge.

The **Chairman**. Do you think the States ought to be allowed to run their own institutions and carry on in that manner, as provided in the Constitution, or do you feel that a judge, in his all-powerful attitude, as some of them seem to take, can take over school districts and hospitals and other institutions, in what I consider in violation of the Constitution?

In other words, as to judicial activism, just how do you stand?

Mr. **Easterbrook**. Senator, I believe that a judge is permitted to act only when authorized by some express command from either the Constitution itself or the legislative branches, and that a judge should in no circumstances create obligations that cannot be solidly founded on statutes or on the text and history of the Constitution itself.

The **Chairman**. I believe you have written many articles, haven't you?

Mr. **Easterbrook**. I have.

The CHAIRMAN. In one of your articles, entitled, "Substance in Due Process," which appeared in the 1982 Supreme Court Review, you stated that you proposed to examine the rationale of the peculiar Constitutional dichotomy between substance and process, in cases in which legislatures are given free rein in defining substance. As part of your conclusion, you state: "Neither history nor stare decisis explains the doctrines. Today, the Court makes no pretense that its judgments have any basis other than the Justices' view of desirable policy."

Mr. Easterbrook, in this article, you have concluded that the Court has assumed powers it was not given. Would you tell the committee what you consider the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. EASTERBROOK. Senator Thurmond, I have two separate answers to that question. I believe with Justice Harlan—the second Justice Harlan—that a judge of the Supreme Court has a duty to persuade his colleagues that the course on which they are embarked is wrong, if the judge sees it to be wrong; but unless he can persuade his colleagues, he has a duty——

The CHAIRMAN. Please speak a little louder. I cannot hear you.

Mr. EASTERBROOK. I am sorry, Senator. A judge has a duty to persuade his colleagues that they are wrong, if he believes them to be wrong. But unless he can persuade them that way, he has a duty to follow the decisions as they have been laid down. But that obligation is an obligation of the justice of the Supreme Court. The judge of a lower court should follow the decisions of the Supreme Court, however much he disagrees with them. The judge of an inferior court has an obligation to obey the law as it has been definitively announced, and not to set off on his own view, according to his own likes.

The CHAIRMAN. I presume you would not hesitate to overturn a decision if you were convinced that that decision was in conflict with federalism or the constitutional provisions?

Mr. EASTERBROOK. Certainly, if it were a decision of an inferior Federal court, I would not hesitate to disagree with it, if I could persuade my colleagues to do so. On the other hand, if it is a decision of the Supreme Court, the lower courts have no authority to disagree with the decision of the Supreme Court; they are absolutely bound.

The CHAIRMAN. Mr. Easterbrook, in his famous dissent in *Plesser* v. *Ferguson* in 1893, Justice John Harlan referred to our Constitution as "a colorblind Constitution." Would you agree with this characterization?

Mr. EASTERBROOK. I do, Senator.

The CHAIRMAN. Mr. Easterbrook, it has been suggested that our prisons turn prisoners into more professional criminals. What, in your opinion, can or should be done to improve the prisoner rehabilitation system?

Mr. EASTERBROOK. Senator, that is a problem of great complexity, and I have no sure cure. I think, however, that two things are very important. First, in prison administration, it is very important for prison administrators to create predictable and understandable environments for prisoners to live in—and that is an argument my colleague, Norval Morris, has made, and which a new Federal prison in Butner has adopted, and I understand, with great success.

My second answer is that I think it very important for judges to create rules of law which are themselves understandable and predictable, so that people in prison do not perceive that they are the victims of unreasoned or arbitrary application of legal principles; that people in prison understand that their punishment is certain and justified rather than open to question, so that the way in which judges articulate principles is very important for the rehabilitation of prisoners. I think that judges should strive to articulate principles that are clear, understandable, and easily applicable.

The CHAIRMAN. What, in your opinion, is needed to speed up the disposition of Federal cases? So many times, the dockets are clogged. Do we need more judges or magistrates, or a change in the criminal procedures, or do judges need to work longer days to clear these dockets up—just what should be done, in your judgment—or maybe some of all of it.

Mr. EASTERBROOK. I am afraid my answer is probably "a little of each." Some changes in the definition of Federal jurisdiction would help shorten the queue and speed up the process; some changes in the efficiency with which judges conduct their business would help too. I understand that many judges are greatly concerned about the effect of calendar management on that. So my answer, I think, is "a little of each"; there is a need for better management in the courts, and there is a need for some changes in the definition of Federal jurisdiction.

The CHAIRMAN. I am informed that Senator Metzenbaum has a few questions. If you would kindly answer those for the record as soon as possible, and I think the quicker, the better, because I would like to get your nominations up.

Mr. EASTERBROOK. Senator, I will be happy to answer them as quickly as I can.

The CHAIRMAN. Does Senator Metzenbaum have a staff member here?

[No response.]

The CHAIRMAN. If they could get those questions to him by 1 o'clock today, so we can transmit them to him for the file.

Are you going to be in the city today?

Mr. EASTERBROOK. Yes; I will, Senator.

The CHAIRMAN. Stay in touch, then, with the chief counsel here, on these nominations, so we can try to get those answers in, if possible, today.

Mr. EASTERBROOK. Thank you, Senator.

The CHAIRMAN. I think those are all the questions I have.

I hope you have a happy tenure on the bench.

Mr. EASTERBROOK. If I am confirmed; thank you.

The CHAIRMAN. If there is nothing else to come before the committee, we now stand adjourned.

[Whereupon, at 10:25 a.m., the committee was adjourned.]

BIOGRAPHIES

Charles E. Wiggins

NOMINEE, U.S. CIRCUIT JUDGE, NINTH CIRCUIT

Birth: December 3, 1927, El Monte, CA.

Legal residence: Virginia.

Marital status: Married to Betty Jo Wiggins, 5 children.

Education: 1945—University of Utah; 1948-49—Pasadena City College, A.A. degree; 1949-50, 1952-53—Univ. of Southern California B.S. degree; 1953-56—Univ. of Southern California School of Law. LL.B. degree.

Bar: 1957—California.

Military service: 1945-48, 1950-52—U.S. Army.

Experience: 1956-57—Law clerk, Hon. Frank G. Swain, Los Angeles superior Court; 1957-59—Private practice; 1959-66—Wood & Wiggins, partner; 1967-79—U.S. Congress, House of Representatives; 1979-82—Musick, Peeler & Garrett, partner; 1982-84—Pierson, Ball & Dowd, counsel; 1984 to present—Pillsbury, Madison & Sutro, counsel.

Frank H. Easterbrook

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT

Birth: September 3, 1948, Buffalo, NY.

Legal residence: Illinois.

Marital status: Single.

Education: 1966-70—Swarthmore College, B.A. degree; 1970-73—University of Chicago, J.D. degree.

Bar: 1975—District of Columbia.

Experience: 1973-74—Law Clerk, Hon. Levin H. Campbell, U.S. Court of Appeals for the First Circuit; 1974-79 Department of Justice Office of the Solicitor General, Assistant to the Solicitor General, (1974-77), Deputy Solicitor General (1977-79); 1979-present—University of Chicago Law School: Assistant professor of law (1979-81), Professor of Law (1981-84), Lee & Brena Freemen Professor of Law (1984 to present); 1980-present—Lexecon, Inc., principal economic consultant.

CONFIRMATION HEARING ON:

RICHARD F. SUHRHEINRICH, HOWELL COBB, H. TED MILBURN, JAMES H. JARVIS II, THOMAS A. HIGGINS, JAMES F. HOLDERMAN, JR., AND CHARLES R. NORGLE, SR.

TUESDAY, SEPTEMBER 18, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:25 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Leahy.

Staff present: Duke Short, chief investigator, Allan Spence, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. I understand you have a statement you want to make on behalf of one of these appointees, and we will be glad to hear from you.

STATEMENT OF HON. WILLIAM BROOMFIELD, A U.S. REPRESENTATIVE FROM THE STATE OF MICHIGAN

Mr. Broomfield. Thank you, Mr. Chairman, and I appreciate this opportunity. It is a special privilege for me to introduce Richard Suhrheinrich of Grosse Pointe, MI, who has been nominated for a seat on the U.S. district court in Detroit.

As the senior member of the Michigan Republican delegation, I have been involved in a selection of candidates for Federal judicial posts for several years and I am extremely proud of the high caliber of candidates we have been able to recommend, but Dick Suhrheinrich is clearly at the top of the list.

Our selection process includes a peer review panel composed of a cross-section of the Michigan legal community. They were unanimous in their enthusiastic recommendation of Dick Suhrheinrich for this position.

Although he is just 47 years old, Dick has already risen to the top of his profession. He is a founding and senior partner in one of Detroit's most prominent medical malpractice firms and is recognized as among the most able practitioners in this complex field.

Among his peers, there is no question about his legal credentials, but what is equally impressive to me is his desire to serve. At a time when some of the most qualified men and women are not always attracted to Government and others are leaving it, Dick is seeking the opportunity at substantial personal loss. Our country is fortunate that there are still patriotic, talented Americans like Dick who are willing to step forward and volunteer to serve.

Mr. Chairman, I respectfully urge his confirmation to the U.S. district court of the eastern division of Michigan.

The **Chairman**. Thank you very much. We appreciate your presence and your high endorsement of this appointee will carry great weight with the committee.

Mr. **Broomfield**. Thank you very much, Senator.

The **Chairman**. You are welcome to stay or you may be excused, whatever you prefer to do.

Mr. **Broomfield**. I will stay for a few minutes.

The **Chairman**. Now, I think we might swear in all these appointees at one time: H. Ted Milburn of Tennessee—you can just stand where you are if you want to—James H. Jarvis II, of Tennessee; Thomas A. Higgins, of Tennessee; James F. Holderman, of Illinois; Charles R. Norgle, of Illinois; Richard F. Suhrheinrich, of Michigan; and Howell Cobb, of Texas.

Will you raise your rights hands and be sworn? Do you solemnly swear that the testimony you shall give in this hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

Mr. **Suhrheinrich**. I do.

Judge **Milburn**. I do.

Judge **Jarvis**. I do.

Mr. **Higgins**. I do.

Mr. **Holderman**. I do.

Judge **Norgle**. I do.

Mr. **Cobb**. I do.

The **Chairman**. Just be seated and we will call you up in due time. Now, Senator Baker wanted to be here, so we will wait a little bit on him for the Tennessee appointees. Also, the Senator from Illinois wanted to be here, too, so we will go ahead with the appointee from Michigan, Mr. Suhrheinrich.

We are glad to have you with us and we congratulate you on your appointment. Do you have any family or friends you would like to introduce? If so, you can do so at this time.

TESTIMONY OF RICHARD F. SUHRHEINRICH, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN

Mr. **Suhrheinrich**. Yes, Senator, I do. If I may, I would like to introduce my wife, Beverly, in the back; my partner and his wife, Richard and Mrs. Kitch; and the president of the Edward W. Sparrow Hospital, both a client and friend, Forrest Karl Newman.

The **Chairman**. Well, we are glad to have you with us.

Mr. Suhrheinrich, did I pronounce that correctly?

Mr. **Suhrheinrich**. Yes, sir.

The **Chairman**. You have been a practicing attorney since 1963. Now, you have been nominated for the position of U.S. district court judge. What do you feel will be the most rewarding aspect of serving in this capacity?

Mr. SUHRHEINRICH. As a trial lawyer for approximately 21 years, and having gone through this process, I think it has underlined the responsibility that a Federal judge has in decisionmaking, plus, adding to that, making sure that the people are protected under the laws of this country.

I think that responsibility, coupled with the desire to serve and to continue in the profession of law, would be the most rewarding aspect that I feel.

The CHAIRMAN. Would you give the committee your thoughts on what specialized training, if any, attorneys should undergo before they are allowed to practice in Federal courts?

Mr. SUHRHEINRICH. Well, I think it is desirable and necessary that one have a strong academic background both in the study of law and continuing thereafter with a strong knowledge of the Federal Rules of Procedure and Evidence.

In addition, I think there should be a history of honesty and integrity, and certainly some humility, or a great deal of humility, in the practice of law. I think that, coupled with experience trying major litigation, is helpful to a Federal district judge.

The CHAIRMAN. Now, I have seen some Federal judges embarrass jurors and attorneys and witnesses unnecessarily. They have got all the power in the world, but they seem to want to flaunt that power.

I think judicial temperament is a very important quality for a judge. The man with the most power should be the humblest. I would like to get your views on judicial temperament and how you feel about it.

Mr. SUHRHEINRICH. Senator, I would like to give you my views that I see as a practicing attorney. What I feel the temperament of a judicial officer ought to be is one who acts with courtesy to both the litigants and to the attorneys, one who has the humility to research the law when he or she is not familiar with it, and lastly, being both courteous and humble to those in front of you to ultimately and quickly make a decision on the issues before the court.

The CHAIRMAN. Now, another thing I think we all ought to be interested in is federalism. When the Constitution was written, the forefathers met in Philadelphia and they wrote in the Constitution that certain powers are given to the Union, the central government, and all other powers were reserved to the States.

But some judges today feel they have got the authority to go into every facet of people's lives and every phase of the community. They have taken over school districts, they have taken over hospitals, and done other things. I frankly do not know their authority for that.

We have got to preserve the power of this Union—national defense, interstate commerce, foreign affairs, customs duties, and all those things in article I, section 8, of the Constitution, and in the amendments adopted since the adoption of the Constitution. But all other powers are still reserved to the States.

How do you feel about that?

Mr. SUHRHEINRICH. I totally agree with that, Senator.

The **Chairman**. I think that is all the questions I have. I hope you have a happy tenure on the bench.

I want to say to all you people who have been appointed that we are ready to go forward and act on them immediately, if someone does not filibuster these appointments and try to hold them up. In the event that any of them are not confirmed at this time by the Senate, it will not be the fault of the Judiciary Committee because we are going to get them out Thursday, if possible, unless some committee members oppose bringing them out. They can carry them over 1 week, but we will do all we can.

In the event any of them are not completed this term, I presume after President Reagan has been reelected, which I think he will be, he would submit the appointments again. However, I am anxious to see as many reported out as possible. I just wanted to say that for the benefit of all you appointees here this morning.

Mr. Suhrheinrich, you are now excused. If you wish to stay, you can do so, or you can leave if you wish.

Mr. **Suhrheinrich**. Thank you very much, sir.

The **Chairman**. Without objection, we will place the résumé of Mr. Suhrheinrich in the record.

Senator Tower, we are glad to have you here and we will let you speak at this time. We know how busy you are. I believe you have recommended Mr. Howell Cobb to be a U.S. district judge for the Eastern District of Texas. You may proceed at this point.

STATEMENT OF HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator **Tower**. Thank you very much, Mr. Chairman. It is a great pleasure to be here this morning to present to the Judiciary Committee a very distinguished Texas lawyer who has been nominated for a judgeship of the Eastern District of Texas.

I have a complete statement, Mr. Chairman, which I would ask consent be placed in the record, and I will proceed independently of my statement.

The **Chairman**. Without objection, your statement will be placed in the record.

I want to congratulate Mr. Cobb for having such a powerful Senator here to recommend you. Senator Tower is one of the most influential men in the Senate. He is doing a fine job here. We regret his leaving, but you are fortunate to have him on your side.

Do you want to stay, Senator, or do you want to leave?

Senator **Tower**. Mr. Chairman, I would like to say a word or two. I have another obligation at 10 this morning and would like to stay, but unfortunately the press of business requires me to be elsewhere at 10.

I would simply like to say, Mr. Chairman, that Mr. Cobb comes from a very distinguished legal family. He is a native of Georgia, where four generations of his family have been lawyers and judges.

His great grandfather was an officer in the Confederate Army, and he himself was a pilot and an officer in the U.S. Marine Corps. To have that kind of background means that he has been on the right side of every military engagement, maybe not always the winning side.

I have known Howell Cobb for many years personally; he is a personal friend of mine. He is a very public-spirited citizen. He has been active in community affairs, in addition to being a very active trial lawyer. Few of the people I have presented to this committee have had more extensive and significant experience as trial lawyers as Mr. Cobb.

I know him to be a man of exemplary personal conduct and a man who is highly respected in his community, and it is without reservation that I recommend him for the office of Federal judge for the eastern district of Texas. And I would, of course, hope that the committee will act favorably and expeditiously.

Thank you very much, Mr. Chairman.

The **CHAIRMAN**. We are very pleased to have you with us, Senator Tower.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR JOHN TOWER

I am ~~pleased~~ and honored to introduce to you today Mr. Howell Cobb, who has been nominated to the United States District Court for the Eastern District of Texas.

Howell Cobb is a native of Georgia who had the good judgment to move to Texas in his early years. He received his Juris Doctor from the University of Virginia School of Law in 1948. He also has served his country admirably as a pilot and first lieutenant in the United States Marine Corps.

In addition to his impressive academic and military record, Howell Cobb has also had considerable experience in the legal profession. For 27 years, he has been a partner in the law firm of Orgain, Bell and Tucker in Beaumont, Texas. His expertise as a trial lawyer, as well as his fairness and complete professionalism, are recognized and respected by his peers and colleagues. In addition to his reputation in Southeast Texas as an outstanding lawyer, Howell Cobb is held in high regard in the community as a leader in civic affairs.

Howell Cobb has the unquestioned dedication to the legal profession to be a fine judge. As a fourth generation lawyer, he has inherited the sort of judicial temperament that is so necessary in our Federal judicial system. Mr. Chairman, in my view, if Mr. Cobb is confirmed by the Senate, he will bring these same outstanding qualities to the Federal bench, and I am confident of his ability to assume this position.

Mr. Chairman, this nomination signifies the commitment of this Administration to appoint the most qualified jurists to our Federal judiciary. I believe that Howell Cobb can and will fulfill the enormous responsibility of providing a fair and impartial system of justice, a right guaranteed by our Constitution to all of our citizenry.

Therefore, I recommend without reservation that you approve the nomination of Howell Cobb to this important position.

The **CHAIRMAN**. Now, Mr. Cobb, without objection, we are going to place your résumé in the record, and I have a few questions here I would like to propound to you.

Senator Tower, if you want to leave, feel free to leave or stay, whatever you prefer to do.

Senator **TOWER**. I will stick around for just a minute or two, Mr. Chairman.

The **CHAIRMAN**. Mr. Cobb, would you tell the committee how you would handle an incident in which counsel for one of the parties in your court was obviously not a skilled litigator and was not prepared to adequately represent the interests of his or her client?

TESTIMONY OF HOWELL COBB, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TEXAS

Mr. **COBB**. Senator, I think that I would certainly recess the trial and ask the parties and lawyers into my office. I would discuss the matter with the unfortunate lawyer and client, and probably continue the case on my own motion until I felt like that litigant had an opportunity to obtain adequate and effective counsel.

The CHAIRMAN. Mr. Cobb, what kind of guidelines should a judge follow in determining propriety of Federal intervention into State affairs, and are you concerned about strong advocates of public issues being appointed to the Federal bench?

Mr. COBB. Yes, sir, I am concerned about strong advocates and Federal oversight of State agencies. I would have to hear any case on its own facts and the law as applicable to it. I would certainly not try to impose my views on a broad spectrum of State agencies, but try one lawsuit at a time based on its own facts.

The CHAIRMAN. You have read the Constitution and studied it, of course, and you are familiar with it?

Mr. COBB. Yes.

The CHAIRMAN. When was the last time you read it?

Mr. COBB. I cannot tell you, sir. I have read it many, many times; most recently, about 2 months ago, 3 months ago, when I knew I was being nominated.

The CHAIRMAN. Do you believe the Constitution says what it means and means what it says?

Mr. COBB. Absolutely, I certainly do.

The CHAIRMAN. Are you willing to let the local communities and State agencies handle their own affairs and not interfere and dictate to them simply because the Federal judge has the power to do it along that line?

Mr. COBB. Absolutely. That is my true belief, yes, sir.

The CHAIRMAN. Would you like to introduce your family and any friends you have here?

Mr. COBB. Yes, sir, I would. I would like to introduce my wife and my daughter—my wife Amelie Cobb, and my daughter, Caroline Cobb

The CHAIRMAN. We are glad to have you all with us.

That is all the questions I have. I hope you have a happy service on the bench. Again, I say I hope we can get through as many judges as we can, and all we do not, I presume, the President will reappoint next year.

Mr. COBB. Thank you very much, Senator.

The CHAIRMAN. You are now excused and you can leave if you wish or stay if you wish to do so.

Mr. COBB. Thank you, sir.

The CHAIRMAN. Senator Baker, come around.

Senator BAKER. Thank you, sir.

The CHAIRMAN. Representative Lloyd is here, I understand.

Senator BAKER. Representative Boner is here, also, from Nashville.

The CHAIRMAN. Now, which one are you interested in, Representative Lloyd?

Ms. LLOYD. Mr. Chairman, I am here for Ted Milburn.

The CHAIRMAN. You are interested in Ted Milburn for the circuit court.

Mr. Milburn, come around; we have already sworn you. You can come around, too, Congresswoman Lloyd.

Mr. **Short**. Congressman, would you like to come forward as well?

Senator **Baker**. He is here for the Nashville nominee. I would be happy to have him at the table.

The **Chairman**. Senator Baker, we would be very pleased to hear from you at this time. Mr. Ted Milburn has been appointed to be U.S. circuit judge for the sixth circuit.

STATEMENT OF HON. HOWARD BAKER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator **Baker**. Mr. Chairman, thank you very much. I am happy to be at this table once more with Judge Milburn, who was here before the Chairman will recall, as the nominee for the U.S. District Court for the Eastern District of Tennessee. The committee reported him favorably and unanimously and he was confirmed by the Senate.

I am also happy to be at this table with Marilyn Lloyd. Congresswoman Lloyd and I have served together now for a long time and it has been a pleasure for me to serve with her. I have a great respect for her, for her service, and I am pleased to be at this table with her on behalf of Judge Milburn.

Let me introduce Judge Milburn, Mr. Chairman. As I said, he is a district judge for the Eastern District of Tennessee. He is sitting in Chattanooga, and I believe it speaks equally well of his work and the work of the committee that President Reagan has seen fit to send his name to the Senate for consideration as a circuit judge in the sixth circuit.

Judge Milburn's qualifications and expertise are the result of 25 years of hard work in the legal profession, and I am confident that his performance at the circuit court level will reflect the high quality of that which has brought him before you again.

May I say, Mr. Chairman, that I have known Ted Milburn for a long time, and had a high regard for him over the years as a lawyer and as a person. It gave me particular pleasure to nominate Judge Milburn for the district court bench, and when the position on the sixth circuit was created recently by the Congress and approved by the President, I quickly saw an opportunity to recommend to the President that he nominate Judge Milburn for the Sixth Circuit Court of Appeals.

The sixth circuit is a great circuit. It has produced many great men on the bench and in national politics, as the Chairman knows. It is also my home circuit. What little law I know, I learned practicing law in the Eastern District of Tennessee largely, and before the Sixth Circuit Court of Appeals on occasion.

I won some and lost some. I liked winning better, but altogether I came to have a high regard for the circuit court system and for the sixth circuit in particular. Therefore, I used particular care and caution in my choice of a recommendation to the President of a person to fill this position.

So, Mr. Chairman, it is a distinct pleasure for me to recommend Ted Milburn for confirmation as the President's nominee for the Sixth Circuit Court of Appeals.

Mr. Chairman, if I may now, I will yield to my colleague from Congress, Congresswoman Lloyd.

The Chairman. We will be very pleased to hear from you.

STATEMENT OF HON. MARILYN LLOYD, A U.S. REPRESENTATIVE FROM THE STATE OF TENNESSEE

Ms. Lloyd. Thank you very much, Mr. Chairman. I would like for my remarks to be inserted in the record.

I would like to say that it is certainly a pleasure for me to be here both with Senator Baker and with Judge Milburn, and I have a little bit of mixed emotions because I certainly have respect for both men and I am going to miss Senator Baker, and I am going to also miss Judge Milburn, who is my district judge, as he moves out of my district to the Sixth Circuit Court of Appeals.

Both men served with honor and integrity. I think you will agree with me, if I may say this, that Senator Baker is certainly a great statesman that we all respect and we will miss. He leaves a great tradition for us to follow.

I think the same can be said of Judge Milburn. He is respected for his knowledge, for his fairness, and for his integrity. And as he leaves the third district of Tennessee, we wish him well and we know that he will continue to serve his country well.

Thank you, Mr. Chairman.

[Material submitted for the record follows:]

Prepared Statement of Representative Marilyn Lloyd

Mr. Chairman, I'm extremely pleased to appear before your committee once again on behalf of Judge Ted Milburn, this time as he is nominated to the sixth circuit court of appeals.

Judge Milburn, a native of Chattanooga, received his legal education at the University of Tennessee from which he was graduated in 1959. Since that time he has distinguished himself as a member of the bar and on the bench. He is a member of both the American and Tennessee Bar Associations and served on the Professional Ethics and Grievance Committee of the Tennessee Bar Association. He has presided as a special judge on the eastern and western sections of the Tennessee Court of Appeals and as a member of the faculty of the Tennessee Judicial Academy at Vanderbilt University. He was appointed to the State circuit court in 1973 and was subsequently elected to a full 8-year term. Just last year, he was sworn into the office of U.S. district judge for the Eastern District of Tennessee and presides over the southern division.

It is a distinct honor for me to be able to recommend your favorable consideration of Judge Milburn to the ciruit court.

The Chairman. Thank you very much. We are very pleased to have you with us.

Ms. Lloyd. I am always delighted to be here.

The Chairman. You add to the appearance of the committee room.

Ms. Lloyd. Well, we thank you, sir.

The Chairman. Without objection, we will place Judge Milburn's file within the record, a brief résumé.

Now, Senator Baker, do you want me to question each one or do you want to go on and make statements about the other two and then be excused? How do you prefer to handle it?

Senator Baker. Mr. Chairman, you are characteristically courteous in offering me that alternative. As you know, the Senate convenes later this morning. I would like very much to introduce the other two nominees at this time.

The CHAIRMAN. Well, you may proceed because I know how busy you are.

Senator BAKER. Thank you very much, sir.

The CHAIRMAN. Next to the President of the United States, this man sitting right here, Senator Baker, is probably the busiest man in Washington.

Senator BAKER. Mr. Chairman, I am pleased to be here with Congressman Boner from Nashville, who joins us at the table today in support of the nomination of Tom Higgins, of Nashville, for a position on the district court bench for the Middle District of Tennessee.

Tom Higgins' 27-year career has earned him a reputation as a lawyer's lawyer. Incidentally, I have received a tremendous volume of constituent mail congratulating us on the submission of Tom Higgins' name to the President of the United States and to the Senate for its consideration.

Mr. Chairman, may I say that this nomination is to fill a vacancy created by Judge Clure Morton taking senior status in the Middle District of Tennessee. Judge Morton was good enough to indicate to me privately and then later officially by letter that he intended to take senior status as of a particular time.

He gave me an opportunity to consult with lawyers and others in middle Tennessee and throughout the State on the best possible nominee for this position, and I did so. I consulted with a great number of people. I consulted with those at the bar, in trial practice, in business practice, with officials of the middle Tennessee area and at the State level.

It was a remarkable thing to me that out of a list of two or three names that I asked to be submitted to me by perhaps as many as a dozen people, one name always emerged, and that was the name of Tom Higgins.

To tell you the truth, I had never met Tom Higgins that I recalled, and after that development I called Tom on the telephone and I said, "I think you and I should get acquainted because you have a lot of admirers and a lot of supporters for this position."

So I made it my business to become acquainted with Mr. Higgins and to inquire thoroughly into his background and his reputation. Mr. Chairman, I am prepared to say that on the basis of that inquiry, this man has a reputation that is seldom equaled by those of us who have practiced law.

He is universally respected, and he is respected across political lines equally. Republicans and Democrats have joined in support of this man for the district bench. In a word, Mr. Chairman, I believe this man—a journeyman lawyer, a distinguished practitioner of the middle Tennessee area—comes to us in the very best traditions of the Federal judiciary; that is, he is a consensus choice by those at the bar and those in the civic community to occupy a very important position in the Federal judiciary, and that is the district judge for the Middle District of Tennessee.

So I am pleased, Mr. Chairman, to have recommended Tom Higgins to the President of the United States to become a U.S. district judge for the Middle District of Tennessee. And I am pleased as well to be at this table with Bill Boner.

Congressman Boner is a dedicated public servant who has represented his district well. He is a good man to work with, Mr. Chairman. He is a Democrat, but I have forgiven him for that years ago. [Laughter.]

Notwithstanding that, we have found many occasions when it was not only necessary, but desirable and a pleasure to work with Bill Boner in matters of interest to our constituents.

So I am particularly pleased that Congressman Boner is here to join me in presenting Tom Higgins to this committee as the nominee for the U.S. District for the Middle District of Tennessee to fill the vacancy occasioned by the senior status of Judge L.C. Morton.

The **Chairman**. We will be glad to hear from the Congressman at this time.

STATEMENT OF HON. WILLIAM BONER, A U.S. REPRESENTATIVE FROM THE STATE OF TENNESSEE

Mr. Boner. Thank you, Mr. Chairman. It is an honor for me to be here. First of all, I want to compliment Senator Baker on his appointment of Tom Higgins. I have had a chance to know him when I was in law school at night when he was my teacher.

One of the questions you might want to ask him is that he make sure he give all of his litigants the ample opportunity to have the jury decide the trial because I am convinced that our group would have won our moot court case if he had let us stay in there longer than we actually did.

Tom Higgins is a man that I think has been well characterized by Senator Baker. He is not only an outstanding attorney, but he is an outstanding gentlemen. He is one that I have come to know over the years and have a great deal of respect for, not only professionally, but for the contribution he makes in our Nashville community as well. It is an honor for me to be here and speak on his behalf.

I would be remiss, Mr. Chairman, if I did not say that, like my colleague, Marilyn Lloyd, we are going to greatly miss Senator Howard Baker. He has been a friend, and I have often characterized Howard Baker's and Bill Boner's philosophy of government: If he was not a Republican and I was not a Democrat, we would both vote pretty much the same in our philosophy of the way this Government ought to be run.

The **Chairman**. Well, maybe you ought to change parties, then. [Laughter.]

Mr. Boner. Well, he might have had a better chance to get elected President this time if he had, Mr. Chairman. I do not know.

It is an honor to be here and to say to you, Mr. Chairman, that I cannot think of anyone that will distinguish the position any more and bring greater recognition and honor to the Federal judiciary system than Tom Higgins will.

The **Chairman**. We are very pleased to have you with us and we appreciate your fine endorsement.

Without objection, we will place Mr. Higgins' résumé in the record.

Now, Senator Baker, you have one more, James H. Jarvis. Would you like to speak to him?

Senator BAKER. This is an embarrassment of riches because I believe sitting here at the table with three nominees for the Federal judiciary is more nominations than I have been able to make to the Federal judiciary in the last 17 years and 9 months.

The CHAIRMAN. I think it is more than anybody else has had, too, Senator. [Laughter.]

Senator BAKER. Well, I think that may be so, and I thank this committee for creating two vacancies so that I might offer these nominations. And in the other case, I thank the committee and the President for permitting me to make these nominations.

It is quite a twist of fate that all of them come at the very end of my term, but I am grateful nonetheless.

Mr. Chairman, James H. Jarvis, the third nominee that I would like to present at this time is presently a judge in the State court system, the Circuit Court of Tennessee for Blount County, which is in east Tennessee, my home region of Tennessee. The Chairman has visited that region; he attended our World's Fair at Knoxville. And I would say for the record that that is the adjacent county to Knoxville.

By the way, the airport where the Chairman landed is in Blount County, so maybe that will give you some geographical reference. It will not offend the sensibilities of those in the room and those on the committee to say that Blount County is perhaps the most Republican County in this solar system. [Laughter.]

It is also the home county of Gov. Lamar Alexander, and it is a great place.

I asked a distinguished panel of lawyers to make recommendations to me for recommendation to the President of a U.S. district judge to fill the position created by the recent enactment of the Congress.

This is a district judgeship for the Eastern District of Tennessee. Judge Jarvis will sit, if he is confirmed by the Senate, as I hope he will be, in the eastern district, along with Judge Milburn's successor in Chattanooga and Judge Robert L. Taylor in Knoxville and Judge Tom Hull in Greeneville, TN.

It is a big district, Mr Chairman. It is an important district. It is a district that will be served well by Judge Jarvis when he is confirmed.

Judge Jarvis is from Maryville, TN, Mr. Chairman. I have known him since he was a very young man. I have known his family for many years prior to Judge Jarvis entering into the practice of law. He comes from a long line of distinguished lawyers and jurists. He has a fine reputation among members of the bar as both a practitioner and a judge.

I recommend him to this committee unhesitatingly and without qualification on the basis of his reputation as a lawyer, as a citizen, and as a judge. I express my gratitude to the President for his nomination of Judge Jarvis for the Eastern District of Tennessee bench. Judge Jarvis will serve with great distinction.

Congressman John Duncan supports this nomination. Congressman Duncan represents the district in which Judge Jarvis lives.

Mr. Chairman, this is the crop and, as the Chairman pointed out, it is a remarkable thing that I can sit here with three nominees for the bench at the same time. But as we tend to do in budget matters, if you amortize it over 18 years, it is not so bad. [Laughter.]

The CHAIRMAN. Well, only the most influential man in the Senate, I think, would get that many nominations.

Senator BAKER. Well, only the Chairman of this committee is the most influential man in the Senate, and I appreciate it.

The CHAIRMAN. I just want to say to these three nominees that you are indeed fortunate to be from Tennessee. Senator Baker is our majority leader, and I think he is the most influential man in Washington and the busiest man, next to President Reagan.

In my opinion, he has made the finest majority leader we have had in the 30 years I have been in the Senate. I congratulate you upon his selecting you to a judgeship, and I will have some questions to propound to you.

Senator Baker has not got time to wait, but I did want to commend you for being appointed upon the recommendation of Senator Baker, and I hope the committee can get these nominations through, and unless the Democrats on the committee do not cooperate, we will get them through.

If any do not get through this year, I presume the President will name the same ones next year after he is reelected.

We are very fortunate to have Senator Baker here. I have never served with a finer man. I appreciate his friendship and I wish him well, although we hate to give him up in the Senate.

Senator, you are now excused if you want to go.

Senator BAKER. Mr. Chairman, thank you very much.

The CHAIRMAN. Congressman Boner, you feel free to leave, too, if you would like to, and we thank you for coming over.

Mr. BONER. Thank you.

The CHAIRMAN. Now, Judge Milburn, you can keep your seat there. Do you have any family you would like to introduce this morning?

TESTIMONY OF H. TED MILBURN, NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Judge MILBURN. Yes, Mr. Chairman, I do. My wife, Elaine; my daughter, Elizabeth, known as Lisa, a senior in high school; my son, Blair, who is a junior at Duke University, are here with me.

The CHAIRMAN. We are very pleased to have you all with us.

Now, I just have a few questions. You have been before the committee before, upon your appointment as a district judge.

Judge Milburn, you have been a U.S. district court judge, I believe, since 1983, just something over a year. I am certain over this period you have witnessed a constant increase in the workload of the court, have you?

Judge MILBURN. Yes, sir, I have.

The CHAIRMAN. All concerned parties seem to agree that this increase will probably continue. Now, do you have any recommendations that might stabilize or decrease this workload?

Judge MILBURN. Mr. Chairman, for several years there have been discussions concerning abolishing diversity jurisdiction. Of course, that lies within the prerogatives of the Congress. That would be one way to cut the tremendous caseload.

On my docket, I guess 60 percent of the cases are diversity cases. But an alternative to abolishing diversity jurisdiction would be to raise the jurisdictional amount from $10,000 to something perhaps in the neighborhood of $50,000. Our small claims courts in Tennessee, the successors to the justice of the peace courts, have jurisdiction up to $10,000.

One other recommendation I might make, and that is in the area of the section 1983 civil rights litigation. It appears to me that if the Congress saw fit to require that a litigant exhaust his or her State remedies before seeking to bring an action in Federal court, that too might greatly reduce the caseload.

The CHAIRMAN. Judge Milburn, in 1980 prisoner petitions comprised approximately 14 percent of all U.S. district civil litigation filings. Various proposals have been made to limit collateral attacks on convictions, including additional requirements calling for complete exhaustion of State remedies, time limitations on the filings of petitions, and eliminating magistrates' authority to hold evidenciary hearings.

Now, do you feel there is a need to alter the degree of access to Federal courts by State prisoners, and if so what recommendations in this area would you make?

Judge MILBURN. Mr. Chairman, I do feel there is a need. If you will pardon a personal reference, the week before last I dealt with the 22d petition filed by a prisoner attacking the same State court conviction. These petitions have been filed by him over a period of years.

I might say that I handled two of them when I was a State circuit court judge. So I was dealing really with a 22d petition filed by the same prisoner involving the same State court conviction, all of the petitions being virtually identical.

I feel that there should be a procedural bar to the number of filings that a prisoner can make with respect to a given conviction. And then, secondly, I feel that perhaps there should be a statute of limitations, a time limitation as alluded to by the Chairman within which these petitions may be filed.

The CHAIRMAN. I am very glad to hear you say that, and that is in line with a bill we have now in this committees crime package which the House is holding up. We have passed it in the Senate and I am hoping yet the House would see fit to take up that crime package.

Judge, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. I may have asked you a similar question when you came up for district judge. How do you feel about that subject?

Judge MILBURN. Mr. Chairman, I feel that there are three separate, co-equal branches of Government, each with an assigned role, and the legislative role belongs to the legislative branches of the Federal and State Governments.

I do not feel that a judge should attempt to make the law. His role is to interpret the law.

The CHAIRMAN. I want to congratulate you on your promotion, and as I stated previously, I hope that we can get you and the others through at this session, if possible. We will do all we can. I hope you enjoy your service on the circuit bench.

Judge MILBURN. Thank you very much, Mr. Chairman.

The CHAIRMAN. You are now excused if you wish to leave, or you can stay around, as you please.

Judge MILBURN. Thank you, sir.

The CHAIRMAN. Judge Jarvis, will you come around?

Without objection, we will put a résumé of you in the record. record.

Judge Jarvis, I believe you served approximately 5 years as a judge for the law and equity court in Blount County, and since 1977 you have served as a circuit court judge for Blount County.

TESTIMONY OF JAMES H. JARVIS II, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TENNESSEE

Judge JARVIS. That is correct.

The CHAIRMAN. Both of these courts, I believe, are State trial courts of unlimited civil jurisdiction, and the circuit court has unlimited criminal jurisdiction.

Judge JARVIS. That is correct.

The CHAIRMAN. I am confident that you are very knowledgeable of State laws. I wonder, however, if you feel you foresee any difficulty in the transition from the State court to the Federal district court.

Judge JARVIS. Mr. Chairman, I do not think I will have too much difficulty in that transition. I think my 12½ years of service on the State bench will serve me well. The rules of civil and criminal procedure at the State level are very similar to those at the Federal level. I will be trying cases, if confirmed, of course, by the Senate, in the Federal court that are very similar to those cases that I have tried at the State level.

I realize, however, that there will be certain issues that I will have to try that I am not quite familiar with at this point in time. Of course, I will have some study and work to do in those areas. I think I am capable of meeting that challenge.

The CHAIRMAN. Judge, do you feel that a judge should assume direct control of complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge JARVIS. Well, I think it is the duty, of course, of the judge to move cases as expeditiously as possible without, sacrificing justice in the process. I think that a judge should take charge of complicated cases at the pretrial level through the utilization of pretrial conferences.

However, I do not think that a judge at any level should take charge of a trial. I think the lawyers should be able to try their case as they wish, with the judge, keeping order in the courtroom, ruling on objections, and that type of thing.

But the lawyers know more about their case than a judge will ever know, and I think that if the judge intercedes, many times he does so with a sacrifice of justice being done. So, yes, the judge should take charge in complicated cases, but only to a limited degree.

The **CHAIRMAN**. Judge, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Judge **JARVIS**. Mr. Chairman, I took an oath when I began my service as a State judge that I would uphold the Constitution and the laws of the State of Tennessee and of this country. And if given an opportunity to serve as district judge, I would take a similar oath. That means exactly what it says. I would not interject my personal feelings or feelings of conscience as opposed to what the law or the Constitution might say on a particular subject.

We are, after all, a government of laws and not of men, and if we lose sight of that, the system simply will not work.

The **CHAIRMAN**. Would you care to introduce your family or friends you have here at this time?

Judge **JARVIS**. Yes, sir. Mr. Chairman, I have my youngest daughter with me, Louise.

The **CHAIRMAN**. We are very pleased to have her with us.

Judge **JARVIS**. Well, it has been an honor to appear here, sir.

The **CHAIRMAN**. That is all the questions I have. I hope you have a happy tenure of service on the bench. You are now excused if you wish to leave.

Next is Thomas A. Higgins, of Tennessee, to be district judge.

Do you have any family or friends that you would like to introduce?

TESTIMONY OF THOMAS A. HIGGINS, NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF TENNESSEE

Mr. **HIGGINS**. I do, Mr. Chairman. I am almost embarrassed about it. May I stand to do it?

The **CHAIRMAN**. Sure.

Mr. **HIGGINS**. If the committee please, Mr. Lew Conner, Jr., of Nashville, recently of the Tennessee Court of Appeals, just recently resigned; Mr. George Barrett of the Nashville bar; Mr. John Hollins of the Nashville bar; one of my law partners for more than 25 years, Mr. W. Ovid Collins, Jr.; the Honorable Irvin Kilcrease, chancellor of the chancery court at Nashville, and presiding judge of the circuit, criminal and chancery courts at Nashville; Mr. W. E. Herod, of Nashville; Mr. Al Abbey, of Nashville; Mr. Dick Lansden, of Nashville; Mr. George McGugin, of Nashville; Mr. Wilson Sims, of Nashville, and the president-elect of the Tennessee Bar Association; Mr. Douglas Fisher and his lovely wife, Mrs. Fisher; Mrs. Mary Martin Schaffner, a partner of Mr. Fisher's; Mr. W.R. Willis, Jr., a former law partner of mine of 25 years ago, of Nashville; Mr. A.B. Neil, Jr., of Nashville.

Mr. Chairman, I appreciate—

The **CHAIRMAN**. Any family you have with you? [Laughter.]

Mr. **HIGGINS**. If Your Honor please, Mr. Chairman, General Joe Haynes, the deputy attorney general of the State of Tennessee. And, if I may, my wife, Gedy.

The CHAIRMAN. Last, but I imagine she would be first, of course. [Laughter.]

We are very pleased to have all of you with us. I believe you have got half the Tennessee bar here this morning. [Laughter.]

You have the president of the Tennessee bar here, you say?

Mr. HIGGINS. Yes, sir; the president-elect, Mr. Wilson Sims.

The CHAIRMAN. Would you stand up a minute?

[Mr. Sims stood.]

The CHAIRMAN. Do you recommend Mr. Higgins to be a judge in the Federal court here?

Mr. SIMS. Mr. Chairman, that is not only my personal recommendation, but I feel that is the recommendation of the lawyers throughout the State.

The CHAIRMAN. Are you speaking in a consensus of all these people sitting back there?

Mr. SIMS. Yes, sir.

The CHAIRMAN. If anyone dissents, let him rise up. [Laughter.]

Thank you very much.

Mr. Higgins, you are presently a partner, I believe, in the firm of Cornelius, Collins, Higgins and White.

Mr. HIGGINS. Yes, sir.

The CHAIRMAN. Would you please tell the committee the arrangements which you have made to dissolve your financial interest in your law firm, what the period is involved, and what arrangements you have made to be compensated for your work in pending litigation?

Mr. HIGGINS. Mr. Chairman, under our partnership agreement, upon my withdrawal I will be paid a predetermined amount over a period of 2 years after my withdrawal from the firm. I would retain, under the agreement, no interest in work in progress or any other interest in the firm.

During that period of time, I would not hear anything or any matters involving the firm, and I have represented to the Senate committee in my disclosures that I will not only not hear anything involving my law firm during those 2 years while they are obligated to pay me for my interest in the law firm, but at any future time so long as I am on the Bench to avoid any appearance of impropriety.

The CHAIRMAN. Mr. Higgins, do you believe it would be helpful to you as a district court judge to have a sentencing commission to establish uniformity in sentencing? The reason I ask you that is in the sentencing reform bill which passed through the Senate separately, and also as part of the crime package we included such a provision.

The judges are not bound by it, but it gives guidelines to them, and if they did not follow the guidelines, they would have to explain why they did not follow them.

Mr. HIGGINS. Yes, sir. Mr. Chairman, I think it would be helpful as guidelines and assistance to the district judges to have such a commission, consistent with the doctrine of separation of powers, so long as there is no undue invasion of the judicial branch of the Government.

The CHAIRMAN. Mr. Higgins, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

Mr. HIGGINS. No, sir. I think those are the classical, traditional cannons of constitutional and statutory construction, and I believe that is the appropriate way to approach the matter.

The CHAIRMAN. I think that is all the questions I have. All of you Tennessee judges are highly recommended and I hope we can get action on you very soon, just depending on the attitude of the Democrats on the committee and in the Senate.

You are now excused. We are glad to have you with us. We hope you have a happy service on the bench.

Mr. HIGGINS. Thank you, sir.

The CHAIRMAN. Now, we are going to take the Illinois judges next. Mr. Holderman, if you will come around?

Mr. HOLDERMAN. Good morning, Mr. Chairman.

The CHAIRMAN. Do you have any family or friends here you would like to introduce?

TESTIMONY OF JAMES F. HOLDERMAN, JR., NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Mr. HOLDERMAN. Yes, I do. If I might, Mr. Chairman, my wife, Kay, from Chicago has joined me this morning.

The CHAIRMAN. Senator Percy recommended you, I believe, and I am sure he has been detained or he would be here. But his strong endorsement should mean a great deal to you because he is held in high esteem by the President and by the Senate, and I congratulate you on your appointment.

Mr. HOLDERMAN. Thank you, Mr. Chairman.

The CHAIRMAN. Now, without objection, a résumé will be placed in the record.

Mr. Holderman, I believe you previously served as assistant U.S. attorney for the Northern District of Illinois for approximately 6 years; is that correct?

Mr. HOLDERMAN. That is correct.

The CHAIRMAN. Do you believe this experience will be beneficial to you an a U.S. district court judge, and if so, how?

Mr. HOLDERMAN. Mr. Chairman, I believe it will be most beneficial. As I have told young prosecutors coming into the U.S. attorney's office in Chicago, a good federal prosecutor is going to think like a defense lawyer and, by the same token, a good defense lawyer is going to think like a prosecutor.

A good Federal judge is going to think like each of the participants in the litigation before him, and I believe that the benefits I derived as a prosecutor will be most helpful to me in following the law and in assisting the litigants before me as a Federal judge.

The CHAIRMAN. Mr. Holderman, would you give us your views on penalties that should be imposed for second and third-time drug violators?

Mr. HOLDERMAN. Drug violations, Mr. Chairman, are probably one of the worst criminal law problems that we have in this country. I believe that repeated violators of the drug laws should be dealt with severely.

Now, obviously, each case must be dealt with on the basis of its own facts, but someone who is given a first chance and then loses that chance by making a second violation, I think, should be dealt with severely.

The CHAIRMAN. Mr. Holderman, what are the standards that you would use in deciding that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. HOLDERMAN. Mr. Chairman, I believe that in dealing with all matters that the court is obliged to follow the law and the Constitution. In making a determination as to whether the court has a continuing responsibility, I would have to follow the law.

I believe there are only limited situations where that is something that is involved, but I would follow the law and the Constitution in making that determination.

The CHAIRMAN. I am very interested in the subject, as you heard me say previously, of judicial activism.

Mr. HOLDERMAN. Yes.

The CHAIRMAN. How do you feel about that?

Mr. HOLDERMAN. Mr. Chairman, I believe you have stated the position before and I agree with you 100 percent. The Founding Fathers of this country, as I stated in my submissions to the Senate Judiciary Committee, created three branches of Government, and I believe that strong positions for each of those branches have been set forth and should be followed as set forth in the Constitution.

The CHAIRMAN. Do you believe in letting the State and the local communities run their own institutions?

Mr. HOLDERMAN. Absolutely, 100 percent.

The CHAIRMAN. It is really irritating to me to see some Federal judges flaunting their power and exercising power that they should not use. I am disturbed when they try to run school districts, hospitals, prisons, and other institutions of the people.

Do you think you could be restrained from doing that?

Mr. HOLDERMAN. Yes, I do. I believe I would follow the law and the Constitution, as my oath of office would dictate and mandate.

The CHAIRMAN. Unless the Federal Government has specifically delegated a function to the Union, the States still have that authority.

Mr. HOLDERMAN. That is correct.

The CHAIRMAN. That is the Constitution.

Mr. HOLDERMAN. That is correct, Mr. Chairman.

The CHAIRMAN. I wish you well on the bench and I hope you have a happy tenure of service.

Mr. HOLDERMAN. Thank you, Mr. Chairman, and thank you for the opportunity to appear before you.

The CHAIRMAN. Now, Senator Percy, of course, recommended you and Senator Dixon has sent over a statement endorsing you. We will place that in the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR ALAN J. DIXON

Mr. Chairman, I am pleased to support the nomination of James F. Holderman, Jr. to be a United States District Judge for the Northern District of Illinois.

I have known the Holderman family for more than 30 years, and can attest to its fine reputation in Illinois.

Mr. Holderman is certainly well qualified to carry out the duties of a District Judge. For the past six years, he has been a partner in the nationally known Chicago-based firm of Sonnenschein, Carlin, Nath and Rosenthal.

Prior to that, Mr. Holderman distinguished himself as a great public servant while serving as an Assistant U.S. Attorney for the Northern District of Illinois. He has also been a private practitioner and a Law Clerk to the Honorable Edward J. McManus, Chief Judge of the U.S. District Court for the Northern District of Iowa.

Mr. Holderman received his B.S. and J.D. degrees from my own alma mater, the University of Illinois.

Mr. Holderman is married to the former Catherine Booras, and together they have two children.

Mr. Chairman, I am sure that Mr. Holderman will be a credit to the bench, the legal profession, and to the people of Illinois and the United States.

I urge full committee approval of Mr. Holderman's nomination.

Mr. HOLDERMAN. Thank you, Mr. Chairman.

The CHAIRMAN. You are now excused. You may leave or remain, whichever you prefer.

Now, I believe our last judge this morning is Charles R. Norgle, Sr., of Illinois, for the northern district of Illinois. Without objection, we will place a résumé of you in the record.

Mr. Norgle, I believe you are a judge now, 18th Judicial Circuit Court in DuPage County, IL?

TESTIMONY OF CHARLES R. NORGLE, SR., NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS.

Judge NORGLE. That is correct, sir.

The CHAIRMAN. You were appointed in 1981 and you are still serving on that bench?

Judge NORGLE. I was appointed judge in 1973 and I have been a judge for approximately 12 years. I most recently was elected to a circuit judgeship in 1982, Senator.

The CHAIRMAN. What is the difference between an associate judge up there and a circuit judge?

Judge NORGLE. The circuit judges are elected in Illinois and associate judges are appointed in Illinois. There is a jurisdictional difference between an associate judge and a circuit judge. I have been, in effect, a circuit judge for approximately 5 years, and circuit judges are judges of unlimited jurisdiction in civil and criminal cases.

The CHAIRMAN. Circuit judges have unlimited civil jurisdiction?

Judge NORGLE. And also criminal jurisdiction.

The CHAIRMAN. And unlimited criminal——

Judge NORGLE. That is correct.

The CHAIRMAN. They have the power of death penalty?

Judge NORGLE. That is correct, and I have had death sentence cases.

The CHAIRMAN. I see. Do you foresee any difficulty in the transition from the State court to the Federal district court?

Judge NORGLE. Not at all, Senator. I believe that my nearly 12 years on the bench has prepared me for the challenges that I expect to meet at the U.S. district court.

The CHAIRMAN. Judge, will you tell the committee how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern?

Judge NORGLE. First, I do not believe that I have any conflicts of interest. I do not expect any in the future. If any were to occur, I would recuse myself from hearing the case or terminate any potential conflict or terminate any relationship that might give the appearance of conflict.

In any event, I would not hear any case that would present any conflict whatsoever.

The CHAIRMAN. Judge, where, in your view, does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Judge NORGLE. Of course, the decisive document is the U.S. Constitution, and I respect the separation of powers. A judge should not make the law. It is the function of the judge to decide the case that is before him under the law. He should respect the legislative function and keep in mind that a judge's obligation is to decide the case in controversy based on the pleadings that appear before him, and that he, the judge, should not make the law; he should respect the law and be the interpreter of the law which is created by the legislative branch of the government.

The CHAIRMAN. I have an article here from the Chicago Tribune dated Sunday, April 22, 1984. The heading of that page is "Perspective." It says, "Judges making city government a Federal case." I want to just take the time to read a paragraph here on that:

> Who runs Chicago, Mayor Harold Washington, Alderman Edward R. Vrodolyak? The answer may be neither. The answer may be found not on the fifth floor of the city hall or on the city council, but in the U.S. District Court chambers, 219 East Dearborn Street, where the black-robed Federal judges preside.
>
> Meet Chicago police superintendent, Prentice Marshall; city personnel director, Nicholas Buss; Chicago housing authority chief, Marvin Aspen; Chicago FBI chief, Susan Getzendenner; and Milton Shado, who wears two hats—Chicago Board of Education president and Cook County jail warden.
>
> Those are not their official titles. They are all U.S. District Court judges, but they and other judges who preceded them have, for nearly 20 years, shaped the course and events of city, State and Federal governments. Their influence and decisions are described by critics as intrusive and by admirers as a long-needed solution to years of neglect by politicans and government officials.
>
> The influence and power is not just confined to Federal judges in Chicago, but spans the Nation's Federal judiciary. Federal judges oversee mental health institutions, hospitals, school systems, and prisons across the country. The prisons in more than half the States in the Nation have been under the control of the Federal courts at one time.
>
> Fred Rice is the choice of Mayor Washington for police superintendent, but it is Prentice Marshall who forbids Rice to promote police officers from the rank of sergeant to lieutenant.
>
> Edward Hegarty is the chief of the Chicago FBI office, but it is Susan Getzendenner who has prohibited the FBI from enforcing in Chicago surveillance guidelines that are in use elsewhere in the Nation.
>
> Renault Robinson, Irvin France, and now Zel Smith, have been chief executives of the Chicago Housing Authority, but it was Marvin Aspen who nearly placed the entire CHA into receivership.

Do you catch what I mean?

Judge NORGLE. Yes; I do, Senator.

The CHAIRMAN. Let me go back to just one paragraph here. "Federal judges oversee mental institutions, hospitals, school systems, and prisons across the country." Well, whose job is that?

Judge NORGLE. Senator, I am from Elmhurst, DuPage County, IL. I am not from Chicago or Cook County. I do not want to run

Elmhurst, DuPage County, Chicago, or any institution. My obligation as a judge will be to follow the law, not to become a manager, a shaper or a shaker in the city of Chicago or the State of Illinois.

I believe that the judicial function is limited and that the legislative function has its own controls, as does the executive. The judiciary should stay in the business of judging on a case-to-case basis and to decide the issues that are brought before the court.

In doing so, it is the function of the judge to find on the facts and to interpret the law as it is given to him by the legislative branch of the Government. I am not an activist judge; I have not been for 12 years. I do not intend to be one in the future.

The city of Chicago should run its own departments, perform its own limited functions, and the Federal judiciary should restrain the use of its power and decide the issues under the law as it exists.

The CHAIRMAN. I think that completes my questions, and I see that Senator Percy has just come in.

Senator Percy, would you come around, please?

[Pause.]

The CHAIRMAN. Senator Percy, you have two judges. Would you come around? I imagine you want to speak in their behalf.

We are very pleased to have the senior Senator from Illinois here, Senator Charles Percy. He has recommended James F. Holderman and Charles R. Norgle, Sr., to be U.S. district judges for the Northern District of Illinois.

Senator Percy, these are the last judges. We put it off to give you a chance to get here, if possible. We have heard from them. We would be very glad to hear from you.

STATEMENT OF HON. CHARLES PERCY, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator PERCY. Mr. Chairman, I am deeply grateful to have the chance to be with you. I flew in from Chicago this morning and was, for the first time, delighted to learn that the committee was a little delayed in getting started. I thought you would probably be adjourned or recessed by the time I arrived.

It does give me particular pleasure to formally now introduce to you two men who have just absolutely outstanding, superb records and would be a tremendous addition to the Federal court for the Northern District of Illinois.

First is Mr. James F. Holderman, Jr., nominated by the President to fill a newly created seat on the U.S. District Court for the Northern District of Illinois. He is highly respected and well regarded in the Chicago legal community.

When Jim Holderman graduated from the University of Illinois College of Law, he did so as managing editor of the law review and with scholastic honors. After graduating from law school, he served as a law clerk to the Honorable Edward McManus, chief judge of the Northern District of Iowa. He then served 6 years as assistant U.S. attorney for the Northern District of Illinois.

It was as assistant U.S. attorney that James Holderman earned his reputation as a talented and energetic trial lawyer. As assistant U.S. attorney, James Holderman supervised many lengthy grand jury investigations, most of which dealt with white collar crime, and he personally prosecuted a great number of the criminal cases which resulted from those investigations.

As a result of his experience in the area of white collar crime, the U.S. Department of Justice requested that James Holderman travel across the country to lecture to U.S. attorneys, FBI agents, and assistant U.S. attorneys on that subject.

He has taught law school classes on this and other subjects at the University of Chicago Law School, Northwestern University Law School, and Kent College of Law. In addition, during his past 6 years in private practice, he devoted much time to promoting and participating in pro bono publico work through his teaching and his exemplary work, and through that, James Holderman has gained the respect of many of our sitting judges and the entire legal community.

I am convinced that James Holderman will continue to uphold the tradition of excellence we now have in the northern district court. I was proud to recommend his nomination to the President for consideration. From my own personal experience with him for many years, I can just say that he will be an absolutely outstanding Federal district court judge.

I am also pleased at this time to also introduce to you, Mr. Chairman, a distinguished Illinois State judge who has been nominated by the President to fill a newly created seat on the U.S. district court for the northern district of Illinois, Judge Charles R. Norgle.

Judge Norgle has gained the respect and admiration of many of our sitting judges and the entire Chicago legal community. Charles Norgle was employed on a full-time basis while he attended the John Marshall Law School. That in itself was no easy task.

His achievements are even more impressive when one considers that in addition to holding a full-time job and attending law school classes at night, as I did, Judge Norgle—I know what a strain that is—Charles Norgle was raising nine children.

I was a widower, had three children, and was president of Bell & Howell at the time, so I know what problems one has juggling going to night law school under those conditions. Only an enormous amount of energy and a complete devotion to the law could have made possible the task which Charles Norgle had set for himself.

That energy and devotion are evident in Judge Norgle's 12 years on the bench. In that 12 years, he has demonstrated a deep understanding of the law and the judiciary. His approach to each of the hundreds of cases he presides over each year is conscientious and meticulous.

When editorializing about his race for DuPage County circuit court judge, the Chicago Suburban Tribune called Judge Norgle "an experienced, intelligent, thoughtful, articulate judge." I could not agree more.

I am convinced that Judge Norgle will continue to uphold the tradition of excellence we now have on the northern district court. I was proud to recommend his nomination to the President, and am equally proud to introduce him to this committee for consideration.

Mr. Chairman, I would like to make just one comment that I have never made in the 18 years that I have presented nominees of the President to this committee. I think in your own case, as President of the Senate, your value is immensely enhanced by your wonderful wife, Nancy, and what she does to ingratiate and support and back up your position not only as a U.S. Senator, but as President of the Senate. It is a great value indeed.

In the case of both of our nominees today, I have worked with both of their wives and know them well. Kay Holderman is a perfectly wonderful person and she will be a strong backup for now a new judge. But, also, we have a combination of Lorraine and Chuck Norgle, the same combination we have at home. This combination is a powerful factor, both spouses not only having their own distinguished lives, but also being strong backup for their husbands.

I think in the case of anyone in public life, that is a strong asset, and I make this unusual comment now to show my admiration for both of them, as well as to pay tribute to Nancy Thurmond, who has been such a tremendous asset to the U.S. Senate.

The Chairman. Senator Percy, I want to thank you very much for taking your time. I know how busy you are. Senator Percy is chairman of the Foreign Relations Committee, an extremely busy man. He is a member of other committees. He is held in high esteem here in the Senate and his endorsement of you gentlemen will go a long way with this committee and with the entire Senate. I congratulate you and wish you well on the bench. Thank you, Senator Percy, for coming.

Senator Percy. Thank you very much.

Mr. Holderman. Thank you, Mr. Chairman.

The Chairman. We now stand adjourned.

[Whereupon, at 10:37 a.m., the committee was adjourned.]

BIOGRAPHIES

Richard F. Suhrheinrich

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TENNESSEE

Birth: August 15, 1936, Lincoln City, IN.

Legal residence: Michigan.

Marital status: Married to Beverly Ryan Suhrheinrich, 3 children.

Education: 1954-60—Wayne State University, B.S. degree; 1960-63—Detroit College of Law, J.D. degree.

Bar: 1963—Michigan.

Experience: 1963—Stringari, Fritz & Fiott, law clerk; 1963-67—Mill, Desenberg, Purdy, Glover & Bayer, associate; 1967—Assistant prosecutor County of Macomb; 1967—Rogensues, Ricard & Suhrheinrich, partner; 1967-68—Moll, Desenberg, Purdy, Glover & Bayer, associate; 1968 to present—Kitch, Suhrheinrich, Saurbier & Drutchas, partner (firm has had various other names).

Howell Cobb

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TEXAS

Birth: December 7, 1922, Atlanta, GA.

Legal residence: Texas.

Marital status: Married to Amelie Suberbielle Cobb, 6 children.

Education: 1940-42—St. John's College; 1946—University of Virginia; 1946-48—University of Virginia Law School, LL.B. degree; 1948-49 University of Texas School of Law.

Bar: 1948—Georgia; 1949—Texas.

Military service: 1942-43—Naval Aviation Cadet; 1943-45—U.S. Marine Corps.

Experience: 1949-51—Kelley, Mosheim & Ryan, Houston, TX., associate; 1951-54—Fountain, Cox & Gaines, associate; 1954 to present—Orgain, Bell & Tucker asssociate (1954-56), partner (1957 to present).

H. TED MILBURN

NOMINEE, U.S. CIRCUIT JUDGE, SIXTH CIRCUIT

Birth: May 26, 1931, Cleveland, TN.
Legal residence: Tennessee.
Marital status: Married to Alice Dillow Milburn, 2 children.
Education: 1949-50—University of Chattanooga; 1950-51—Boston University; 1951-53—East Tennessee State University, B.S. degree; 1956-59—University of Tennessee College of Law, J.D. degree.
Bar: 1959—Tennessee.
Military service: 1953-56—U.S. Army.
Experience: 1959-73—Bishop, Thomas, Leitner, Mann & Milburn (firm had several different names during this period); 1973-83—Circuit Court Judge, Sixth Judicial Circuit, State of Tennessee; 1983 to present—U.S. District Judge, Eastern District of Tennessee.

THOMAS A. HIGGINS

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF TENNESSEE

Birth: August 15, 1932, Nashville, TN.
Legal residence: Tennessee.
Marital status: Married to Geraldine Gallagher Higgins, 3 children.
Education: 1950-52—Christian Brother College, A.A. degree; 1952-54—University of Tennessee, B.A. degree; 1954-57—Vanderbilt University School of Law, LL.B. degree.
Bar: 1957—Tennessee.
Military service: 1957-1960—U.S. Army, Judge Advocate General's Corps.
Experience: 1960-61—Willis & Higgins, partner; 1961 to present—Cornelius, Collins, Higgins & White (firm has had various other names), associate (1961-66), partner (1966 to present).

JAMES H. JARVIS II

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TENNESSEE

Birth: February 28, 1937, Knoxville, TN.
Legal residence: Tennessee.
Marital status: Married to Pamela K. Duncan Jarvis, 5 children.
Education: 1955-58—University of Tennessee; 1958-60—University of Tennessee College of Law, J.D. degree.
Bar: 1961—Tennessee.
Experience: 1960-68—O'Neil, Jarvis, Parker & Williamson, associate; 1968-70—O'Neil, Jarvis, Parker & Jarvis, partner; 1970-72—Meares, Dungan & Jarvis, partner; 1972-77—Judge, Law and Equity Court, Blount County; 1977 to present—Judge, circuit court, Blount County.

JAMES F. HOLDERMAN, JR.

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: May 30, 1946, Joliet, IL.
Legal residence: Illinois.
Marital status: Married to Catherine Booras Holderman, 2 children.
Education: 1964-68—University of Illinois, B.S. degree; 1968-71—University of Illinois College of Law, J.D. degree.
Bar: 1971—Illinois.
Experience: 1971-72—Law clerk to Hon. Edward J. McManus, Chief Judge, U.S. District Court, Northern District of Iowa; 1972—Private practice; 1972-78—Assistant U.S. attorney, Northern District of Illinois; 1978 to present—Sonnenschein, Carlin, Nath & Rosenthal, partner.

Charles R. Norgle, Sr.

NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Birth: March 7, 1937, Chicago, IL.

Legal residence: Illinois.

Marital status: Married to Lorraine Norgle, 9 children.

Education: 1964—Northwestern University, BBA degree; 1969—John Marshall Law School, JD degree.

Bar: 1969—Illinois.

Military service: 1955-57—U.S. Army.

Experience: 1969-71—Assistant State's attorney, DuPage County, IL; 1971-73—Deputy public defender, DuPage County, IL; 1973-77—Associate judge, 18th Judicial District DuPage County, IL; 1977-78—Circuit judge, 18th Judicial Circuit Court, DuPage County, IL; 1978-81—Associate judge, 18th Judicial District, DuPage County, IL; 1981 to present—Circuit judge, 18th Judicial Circuit Court, DuPage County, IL.

CONFIRMATION HEARING ON:

R. ALLAN EDGAR, WALTER S. SMITH, JR., WILLIAM D. KELLER, RONALD E. MEREDITH, F.A. LITTLE, JR., WILLIAM G. YOUNG, AND GEORGE LA PLATA

WEDNESDAY, SEPTEMBER 19, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:38 a.m., in room SD-228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff Present: Vinton DeVane Lide, chief counsel and staff director; Robert J. Short, chief investigator; Allan Spence, investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We meet this morning to consider the confirmation of certain judges for the district courts in the Federal system. I would ask all of the appointees to stand, and I will swear you in: Mr. R. Allan Edgar, of TN; Judge Walter S. Smith, Jr., of TX; William D. Keller, of CA; Ronald E. Meredith, of KY; F. A. Little, Jr., of LA; Judge William G. Young, of MA, and Judge George La Plata, of MI.

If you will hold up your right hand and be sworn. Do you solemnly swear that the testimony you shall give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

[Whereupon, the nominees responded in the affirmative.]

The Chairman. Senator Baker has not come yet; Senator Tower, Senator Huddleston, Senator Johnston, Senator Levin, and Senator Riegle.

I see Senator Tower has just come in, so we will take him and then follow with Senator Huddleston.

Senator Tower, please come around. Your appointee is Judge Walter S. Smith, Jr., if you will have a seat there beside him.

Senator Tower, we are glad to have you with us, and you may proceed now.

STATEMENT OF HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator Tower. Thank you very much, Mr. Chairman.

I know that I am getting to be a familiar face in this committee, presenting nominees for judgeships. We have a very big State, very crowded dockets and a shortage of judges, so we naturally appreciate your efforts to expedite these confirmations.

It is a great pleasure to introduce Walter Smith, Jr., who has been nominated by the President to the District Court for the Western District of Texas.

Mr. Smith is a native of Marlin, and he attended the University of Texas, Sam Houston State University, and Baylor University. He is a graduate of Baylor Law School. He has an impressive educational background and a background in the legal profession.

I would like to ask unanimous consent that my statement be placed in the record as if read and proceed to briefly and informally summarize.

The **Chairman**. Without objection, your full statement will go in the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR JOHN TOWER

It is an honor and a distinct pleasure to introduce to you Walter Smith, Jr., who has been nominated by the President to the United States District Court for the Western District of Texas.

Walter Smith is a native of Marlin, Texas. After graduating from Marlin High School, Judge Smith attended the University of Texas, Sam Houston State University, and Baylor University, where he received his Bachelor of Arts degree. He then entered the Baylor University School of Law where he served on the Editorial Board of the Baylor Law Review and from which he received his Juris Doctor in 1966.

In addition to his impressive educational background, Judge Smith has also had considerable experience in the legal profession. He was selected by the Waco-McLennan County Bar Association as Outstanding Young Lawyer of the Year in 1976, and he served for over two years as Judge of the 54th District Court. Since January 1, 1983, he has served as a United States Magistrate for the Western District of Texas, a position which he had held with distinction.

Judge Smith manifests all the qualities necessary in a member of the Federal bench—an intimate knowledge of the law and of legal procedures; adherence to the precepts of the Constitution; and compassion for his fellow human beings. Judge Smith is unquestionably a fair and impartial jurist, and his integrity and devotion to his profession are highly respected by his peers and colleagues. Should he be confirmed, I am confident of his ability to assume this important position.

Mr. Chairman, this nomination signifies the commitment of this Administration to appoint the most qualified and impartial jurists to our Federal judicial system, and is well in keeping with the tradition of excellence among the Federal judiciary in the Western District of Texas.

I recommend without reservation that you approve the nomination of Judge Smith to this important position.

Senator **Tower**. I will say that I have rarely had the opportunity to commend to this committee a man with broader support in the bar and in the general community than Walter Smith. He is enormously well-thought of. It is a very popular selection. As a matter of fact, I would say that it was almost automatic in that District, when this vacancy occurred, that Walter Smith would be the man who would be recommended for it, and I commend him to the committee, as a public-spirited citizen and a fine lawyer, for confirmation, and would ask the committee for early and expeditious consideration of this nomination.

The **Chairman**. Thank you very much, Senator Tower. We appreciate your presence, and I am sure your great reputation and influence in his behalf is of tremendous benefit to him.

I want to say that I have served in the Senate for 30 years—Senator Tower came, I believe, in 1961, and I have served with him ever since—and I have not served with a finer Senator that I consider a sounder and greater patriot and who understands the workings of government here better than Senator Tower. His recommendation carries great weight, and we are very pleased, Judge Smith, to have him come here in your behalf.

Senator TOWER. Thank you, Mr. Chairman, for your very kind remarks. I wish I could recommend even more people for the bench, so I could come here. You always say such kind words about me, and it is one thing whose repetition does not bore me. I am really delighted to hear that, and I appreciate it coming from the very prestigious Senator from South Carolina, who has been my mentor for many years.

The CHAIRMAN. Senator Tower, you can remain or you may retire at your will, whatever you prefer.

Now, we have some other Senators who might be busy, too, and we might take them before we go into questions.

Senator Huddleston, I believe, was here next. Senator Huddleston, would you come around? Senator Ford, I believe, has just come in; would you come around, Senator Ford?

I see former Senator John Sherman Cooper back there. Senator Cooper, are you interested in one of these appointees?

Senator HUDDLESTON. Yes, Mr. Chairman. We would like Senator Cooper to join us at the table.

The CHAIRMAN. Well, we would be glad to have you come to the table, too, Senator Cooper.

Senator Huddleston, we will be glad to hear from you.

STATEMENT OF HON. WALTER D. HUDDLESTON, A U.S. SENATOR FROM THE STATE OF KENTUCKY.

Senator HUDDLESTON. Thank you very much, Mr. Chairman.

I am delighted to be here this morning to present to the committee a young man as a nominee for Federal judgeship in the Western District of Kentucky.

Ronald Meredith happens to come from the same county in Kentucky that I do. I trust that the committee will not hold that against him. But it has given me an opportunity to see this young man grow up, and I observed him as a student, as an athlete, as an interested citizen in his community long before, I guess, either of us ever thought about coming to Washington. He did, in fact, precede me in Washington and served here on the staffs of Senator Cooper and Senator Cook. Senator Cooper is here, and you will hear from him. Senator Cook stopped by a few moments ago. He had other duties that he had to attend to.

The committee, of course, will have a résumé of Ronald Meredith experience. He will be one of the younger members, I am sure, to be considered for this important position. I think he will bring to the bench an understanding of the United States from the standpoint of the small community, plus this city. As you know he served as a staff member of the Judiciary Committee.

So I would add my recommendation, urge the committee to give Ron Meredith its immediate attention and consideration, and I now yield to the distinguished Senator from Kentucky, Senator Ford.

STATEMENT OF HON. WENDELL FORD, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator **Ford**. Mr. Chairman, I thank my colleague.

I, too, would like to voice my support today of the nomination of U.S. Attorney Ronald E. Meredith to be judge of the U.S. District Court for the Western District of Kentucky.

My distinguished predecessors, Senator Cooper and Senator Cook, and my colleague, Senator Huddleston, know better than I the qualifications of Mr. Meredith for this position. I hold their opinions in the highest regard.

One of the major reasons I support Mr. Meredith's nomination is the fact that he was recommended by the Federal Judicial Selection Commission of Kentucky. This commission was created 8 years ago in an effort to ensure that partisanship does not intrude on the judicial selection process. It has worked well since its inception.

Through an established procedure, the commission reviewed 12 different applicants and nominees for this position. The panel, consisting of nine knowledgeable and dedicated Kentuckians, examined the applicant's personal history, as well as legal and judicial experience. Interviews with concerned and knowledgeable citizens were conducted regarding the fitness and qualifications of the applicants and nominees. All of this information, Mr. Chairman, was thoroughly examined by the commission before they recommended Mr. Meredith and four other qualified individuals for this judgeship.

I am proud to have helped to create this commission, along with my distinguished colleague, Senator Huddleston and the Kentucky Bar Association. I believe it has served Kentucky well. The Commission's recommendation of this nominee is not taken lightly by this Senator, and I reaffirm my belief that this process benefits the judicial system. It provides a detailed, fair, and impartial screening of applicants and nominees.

Therefore, with the commission's recommendation, I gladly and wholeheartedly second the nomination of my follow Kentuckian, Ronald E. Meredith, to be judge of the U.S. District Court for Western Kentucky.

The **Chairman**. Thank you very much.

I want to congratulate Mr. Meredith. He is U.S. attorney out there now, district attorney, upon being appointed by President Reagan, and also to congratulate you upon the high endorsement of these two able and distinguished Senators from Kentucky. Their endorsement of you will certainly mean a great deal to you when your appointment is considered in the Senate. We are very pleased to have them with us, and if they wish to be excused—I am going to hear from Senator Cooper, but if you all want to go, you can feel free to go, or you can stay, if you please.

Now, Senator Cooper, we are very pleased to have you with us. Senator Cooper is one of the great Senators who have sat here in years goneby, and it is a great honor to have him before the committee. We are very pleased to hear from you.

STATEMENT OF HON. JOHN SHERMAN COOPER, A FORMER SENATOR FROM THE STATE OF KENTUCKY

Senator Cooper. Thank you, Mr. Chairman.

It is a great honor to come here before this committee. I recall that in my first years in the U.S. Senate, I was a member of this committee. The late Senator Alexander Wilding was chairman, and the late Pat McCurran from Nevada was the ranking member. The honorable James Eastland, who later served as chairman, was a member of the committee at that time.

I will try to be brief, because Senators Ford and Huddleston have shown their fairness and their good spirit, and their understanding of the judiciary by their testimony, and it also was shown by the Federal Judicial Selection Commission in Kentucky, which has recommended Mr. Meredith. I can only say that he worked for me when I was here, first as an intern, then on the Capitol Police and in the Post Office, for several years, and at the same time, in the latter years, he attended George Washington University Law School at night, which showed his dedication and his hard work.

Of course, I cannot speak in detail about his work since then, but I have heard about his career as an able lawyer, as U.S. district attorney in the Western District of Kentucky. I can say without reservation that I consider him a hard worker, a very honorable man, and one who was always without regard to any person's position, their race, their religion, or position in life. He would go by the law and the Constitution, to give everyone a fair trial.

So I thank you, Mr. Chairman, and I will say one more thing. I am very glad to see you here as chairman. After the Second World War, I recall meeting you in France, just after the invasion, when you were dropped over in a parachute, and I have known you ever since. I thank you for this opportunity.

The Chairman. Senator Cooper, we are very pleased to have you with us. We appreciate the great service you have rendered to your country in the Senate of the United States, and in the Armed Services of the United States. You have been a valuable citizen in many ways, and we appreciate it, and we thank you for coming here this morning.

Now, I think that covers the endorsement of this gentleman. You can stay if you care to; you are excused if you wish to leave.

Senator Levin, if you will please come around. We are very pleased to have you with us. I believe you are here to speak in behalf of Judge La Plata.

You may proceed, Senator.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator Levin. Mr. Chairman, thank you very much.

I am glad to be able to be here today to introduce Judge George La Plata. In 1979, Governor Milliken of Michigan appointed him to sit on the Oakland County circuit bench, and Judge La Plata's 5 years of judicial experience and his work as a private practitioner before that well qualify him for the district court. I am glad to be able to be here this morning to speak a word in his behalf.

With the exception of the period of time during which he served his country in the Marine Corps, Judge La Plata has lived in Michigan. He has close ties to the communities that he will serve.

While I do not know him personally, I know him by reputation, and he is highly respected by the lawyers who have appeared before him and people who have worked with him over the years.

Mr. Chairman, I am confident that Judge La Plata would well serve the people of the Eastern District of Michigan. I commend him to the committee. And Senator Riegle, who couldn't be here this morning, joins me in these remarks.

The CHAIRMAN. Thank you very much.

Judge La Plata, I want to congratulate you upon being selected by President Reagan to be appointed to this high position, and from your résumé here and all we have learned about you, you are well-qualified to fill this position, and you are fortunate to have the endorsement of Senator Levin, who is an able and distinguished member of this body. That will be of great benefit to you when the Senate considers your nomination. We are very pleased to have you with us.

Senator Levin, feel free to stay if you want to, or if you want to be excused, we will understand.

Senator LEVIN. Thank you so much.

The CHAIRMAN. I see Senator Johnston coming in. Senator Johnston, please come around. We were just getting ready to question the witnesses, so I am glad you came in when you did. I believe you are here to speak in behalf of F.A. Little, Jr., of Louisiana, to be U.S. district judge.

STATEMENT OF HON. J. BENNETT JOHNSTON, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator JOHNSTON. Yes, sir, Mr. Chairman. Thank you.

Mr. Chairman, I have a written statement I would like to put into the record.

The CHAIRMAN. Without objection, your entire statement will go in the record.

Senator JOHNSTON. I have known F.A.—we call him "Pappy" and I never did ask where the name "Pappy" came from, but anyway, he is known as "Pappy" Little—I have known him for many, many years when we used to be in the junior bar together. Unfortunately, that was a number of years ago. But he is one of Alexandria's and central Louisiana's most outstanding lawyers. He has been very active in the bar. He has an outstanding scholastic record. He is known as a really outstanding not only trial lawyer, but business lawyer. His experience as a lawyer is very broad. I can't think of anybody who is a more universally approved choice for U.S. district judge than F.A. Little. I think it is an unusually good choice. If I were the one making the choice—and unfortunately, President Reagan does not always ask me before he appoints—but if he had asked me before he had appointed F.A. Little, I would have recommended him.

So, Mr. Chairman, it is with a great deal of personal pleasure that I urge this committee to approve F.A. "Pappy" Little as U.S. district judge for the Western District of Louisiana.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR J. BENNETT JOHNSTON

Mr. Chairman and members of the Committee, I am very pleased to appear before the Committee today for the purpose of introducing to you J. A. Little, Jr., nominee to the United States District Court for the Western District of Louisiana.

Mr. Little is a graduate of Tulane University Law School. He has practiced law in Louisiana for approximately 24 years. Presently, he is the President and Director of Gold, Little, Simon, Weems & Bruser, the largest law firm in Central Louisiana.

Mr. Little is an active member of the American Bar Association, the Louisiana State Bar Association and the Alexandria, Louisiana Bar Association.

Mr. Little teaches in the Tulane School of Law and is a constant participant in legal seminars and other professional development programs.

Mr. Little is a member of the Council of the Louisiana State Law Institute, which is composed of outstanding attorneys, judges and law professors. He is a fellow in the American College of Probate Counsel, and a Fellow of the American Bar Foundation.

Mr. Little has also been very active in many civic and charitable organizations. He has served as Director of the Tulane Alumnae Organization, Director of the Alexandria Louisiana Chamber of Commerce and Director of the Central Louisiana Girl Scout Council.

Because of his distinguished career, F. A. Little, Jr. is very well qualified to serve as a Judge to the United States District Court for the Western District of Louisiana and I recommend him very highly. I strongly urge you to approve his nomination.

The CHAIRMAN. Thank you very much.

I want to say to Mr. Little that I congratulate you upon being selected by President Reagan for appointment to be a U.S. district judge for the Western District of Louisiana. You are fortunate to have Senator Johnston come here to endorse you. He is a very influential member of the Senate, and he is held in high esteem, and I am sure that will greatly be to your benefit.

I imagine Senator Long also endorses him, doesn't he, Senator Johnston?

Senator JOHNSTON. He certainly does, Mr. Chairman.

The CHAIRMAN. I would like the record to show that, too.

Senator JOHNSTON. Mr. Chairman, I would also urge the committee to act with dispatch. I know the chairman always does, if he can, and that is directed also to members on both sides of the aisle, because Mr. Little's services as judge are very much needed in the middle district, so I would urge dispatch.

The CHAIRMAN. Senator Johnston, we hope to have a meeting tomorrow and get these judges approved. Now, if you will just help me with your side of the aisle, the Democrats, we will get them all out tomorrow.

Senator JOHNSTON. Well, that was what that comment was meant to do. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Johnston, for your appearance.

I see the distinguished majority leader has come in, so we will hear from him at this time. I believe he is here to speak in behalf of Mr. R. Allan Edgar, of Tennessee.

Senator Baker, we are glad to have you.

STATEMENT OF HON. HOWARD H. BAKER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator BAKER. Mr. Chairman, I am delighted to be here, and I am especially pleased to be here with Al Edgar.

I appear here to introduce him as, I believe, an extraordinary candidate for the Federal bench. President Reagan has nominated Mr. Edgar, as you know, Mr. Chairman, to be U.S. district judge for the Eastern District of Tennessee.

I have known Al Edgar, Mr. Chairman, since he was a young man. He is still a young man, but he is not as young as he was when I first saw him. He has practiced law in Chattanooga. He has distinguished himself as a civic leader. He is an outstanding citizen of his community. And when the opportunity came for me to make a recommendation to President Reagan for a nominee to the district bench in Chattanooga, Al Edgar's name came to mind immediately. I went through the usual drill of checking with Republicans and Democrats, at the bar and in the public community, about their recommendations, and without a single exception, every one of the people I spoke to included Al Edgar's name on the list of those who should be considered, and in most cases he was the number one choice. That is a high accolade, Mr. Chairman, for a relatively young man who has distinguished himself as Al Edgar has, both personally and professionally.

He is now an outstanding attorney; he is a civic leader, and I believe he is exactly the sort of person, Mr. Chairman, that Presidents should nominate to the Federal judiciary. So I am pleased to be here, Mr. Chairman, and to introduce Al Edgar to this committee, to urge his favorable consideration by the committee, so that it may be my privilege and yours to urge that the Senate give its stamp of approval by confirming the President's nomination of this good man.

The CHAIRMAN. Thank you.

Mr. Edgar, I want to congratulate you upon being appointed by President Reagan to U.S. district judge for the Eastern District of Tennessee.

I see we have the very distinguished Representative from Tennessee here now, too, Representative Lloyd. We are glad to have you back.

Ms. LLOYD. Thank you, Mr. Chairman.

The CHAIRMAN. I presume you would like to speak a word in behalf of this gentleman.

STATEMENT OF HON. MARILYN LLOYD, A U.S. REPRESENTATIVE FROM THE STATE OF TENNESSEE

Ms. LLOYD. I certainly would, and I certainly thank you for allowing me to be here.

The CHAIRMAN. Incidentally, is he from your district?

Ms. LLOYD. He certainly is from my district, and we are very proud of him.

The CHAIRMAN. Is that two judges from your district?

Senator BAKER. One is a circuit judge, Mr. Chairman.

The CHAIRMAN. One is a circuit judge, and now you have a district judge.

Senator BAKER. This would be the circuit judge's replacement.

The CHAIRMAN. You may proceed, now.

Ms. LLOYD. Thank you very kindly, Mr. Chairman.

It is an honor to be before your committee again today to endorse the nomination of Al Edgar to the U.S. district court.

A 1965 graduate of Duke University's School of Law, he has practised law in the city of Chattanooga for 20 years and is a member of the American, the Tennessee, and Chattanooga Bar Associations. He taken an active role in civic concerns. He has been a president of the Civitan Club and was appointed by Governor Alexander to a term on the Wildlife Resources Commission. But his expertise is not by any means confined to legal or community matters, and he is going to bring to the bench an insight drawn from his achievements, which are many.

He served a tour of duty with the Army, in Vietnam, receiving a Bronze Star and completed his military career as a captain in Army Intelligence. In addition to this, he is a former member of the Tennessee State Legislature, having represented a Hamilton County district.

I think it is very rare that a man should appear before you who has achieved in so many different capacities, and I think he will certainly serve the southern division of the Eastern District of Tennessee with the same skill and dedication that he has brought to his past duties.

So I am just very pleased to be here to recommend his selection.

The CHAIRMAN. Thank you very much.

Mr. Edgar, I want to say that you are fortunate to have your own fine Congresswoman here to endorse you, and that means a lot to you, I am sure. We are very pleased to have her here again today

I also want to congratulate you on Senator Baker being here in person. He is a very busy man, and frequently, it is impossible for him to be everywhere he would like to be. But he has taken time to come over and be here with you, and there is no Member of the Senate who has any more influence than he has; in fact, I know of none who has as much influence as he does. I think he is one of the finest majority leaders this country has every produced, and we are very pleased to have him come here and endorse you, and that will be to your great benefit.

Senator BAKER. Mr. Chairman, if I may say just a word. I simply cannot let those statements go by without some sort of acknowledgment to you of my appreciation for the remarks and for our friendship over so many years and our service together in the Congress and the Senate of the United States.

And as I leave the Senate at the end of this term after 18 years—which I think of as a long time—one of my principal regrets is that I will not have the opportunity to serve with you and others like you, who make this such a great institution and who carry with you the institutional memory of what the Senate is supposed to be and what you have made it.

I thank you very much for your kind remarks, and I thank you very much for receiving Al Edgar today. And I wish also to thank my friend and my colleague, Marilyn Lloyd, Congresswoman Lloyd, for appearing here today in support of Al Edgar. I think that her support here today and mine maybe says something about the breadth of this man's support and of his character and personality.

So, my thanks to you, Mr. Chairman, and my thanks to Congresswoman Lloyd, and I commend Al Edgar to your tender mercies.

Thank you very much.

The **Chairman**. Thank you very much, Senator Baker. We appreciate your comments, and we thank you for coming.

Congresswoman Lloyd, we thank you for coming.

Ms. **Lloyd**. Thank you very much, Mr. Chairman. We appreciate the kind things you have said about our Senator, because we are certainly going to miss him, as you do.

The **Chairman**. Thank you very much.

Now, Mr. Edgar, you have already been sworn, and without objection, we will place this résumé of you in the record.

TESTIMONY OF R. ALLAN EDGAR, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TENNESSEE

The **Chairman**. Mr. Edgar, do you have any family or friends here with you that you would like to introduce?

Mr. **Edgar**. Yes, Mr. Chairman. I have with me my wife, Gail, and my daughters, Amy and Laura.

The **Chairman**. We are very pleased to have them here today at your confirmation.

Now, Mr. Edgar, would you give the committee your thoughts on what specialized training, if any, attorneys should undergo before they are allowed to practice in Federal courts?

Mr. **Edgar**. Mr. Chairman, I believe that that is an idea whose time may be coming. Of course, as you know, the Chief Justice has made some statements about the quality of representation being provided by attorneys in Federal courts. There have also been several studies made on the necessity of training and possible requirements for practice in the Federal courts.

I have a feeling that if I become a judge, my job would be easier, with better-trained and more qualified attorneys practicing before the courts. I have also a suspicion that perhaps litigants in the Federal courts would be better served by perhaps some training and some admission requirements for practice in the Federal courts. I have not given this subject enough thought to get into the specifics of the precise content of this specialized training, but I think that is something that will be coming down the road in the future.

The **Chairman**. Mr. Edgar, one of the characteristics of judicial activism is that there is a tendency by the judiciary to impose broad affirmative duties upon governments and society. Would you give the committee your views on this criticism?

As you know, we have seen many judges assume authority, and it is very questionable that they have that authority—taking over hospitals and schools and various things of that kind, which are local institutions.

Mr. **Edgar**. I feel that the criticism probably is valid. My personal belief is that the remedies imposed by the courts should be as limited as possible, and as narrow as possible, and should be confined to the actual litigation which is before the court and the parties which are before the court.

Unfortunately, I feel that when courts order broad affirmative action in a broad-sweeping manner, sometimes they end up policing those orders for many years to come. I feel that the Federal courts are really not very well equipped to do that, and sometimes they are not able to do it very well.

The CHAIRMAN. Furthermore, under the division of powers, the Constitution provided certain powers delegated to the Union when they formed the Union; the States had all the powers before the Union was formed. And then, the powers they did not delegate in the Constitution to the Union, and those that have not been delegated by constitutional amendment since then are reserved to the States. Therefore, the Union was comprehended to be and intended to be a government of limited powers, but as the years have gone by, different members of the Government—the Supreme Court, the Congress, the executive branch—have tended to assert authority where they really did not have that authority. And it has gotten to now where the Government is in almost every facet of people's lives. And I think it has reached a point where we have got to begin to assert again the Constitution and let people know that the Federal Government has only the powers given in article I, section 8, and the amendments to the Constitution since the adoption of the Constitution, and that all other powers reside with the States.

Does that coincide with your thinking?

Mr. EDGAR. Yes, sir, it does.

The CHAIRMAN. I think those are all the questions I have of you, and I want to wish you a happy tenure of service on the bench.

Mr. EDGAR. Thank you very much, sir.

The CHAIRMAN. Our next appointee is Walter S. Smith, Jr., of Texas. Judge Smith, please come around.

Without objection, we will place your résumé in the record.

TESTIMONY OF WALTER S. SMITH, JR., NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TEXAS

The CHAIRMAN. Would you like to introduce any family or friends you have here?

Mr. SMITH. Thank you, Mr. Chairman, I would—my wife, Jill Smith; my young niece, Beth Blanks, from Des Moines, IA, who is working here in Washington.

The CHAIRMAN. Judge Smith, you formerly served as a U.S. magistrate for the Western District of Texas, as well as a judge for the 54th Judicial District, I believe. Is that correct?

Mr. SMITH. Yes, sir.

The CHAIRMAN. Do you believe this experience will be beneficial to you as a Federal district court judge, and if so, how?

Mr. SMITH. Mr. Chairman, without being too biased or too immodest, I feel it would be extremely beneficial, for these reasons. I served for 26 months on a State district trial bench, which had a very crowded docket, and during that period of time, I was able to at least satisfy myself that I had the judicial temperament that I think is extremely important for any trial judge. Subsequent to that, as a part-time U.S. magistrate, I have been privileged to try several civil jury trials in the district court by consent, and of course, many misdemeanor criminal trials, so I have been exposed to all facets of the Federal system for the last 1½ years, and I feel that that combination is perhaps unique, but I certainly have confidence personally that I have qualified myself.

The CHAIRMAN. So you have tried lots of cases in the magistrate's court, as well as a judge in the State court, have you?

Mr. SMITH. Yes, I have, Mr. Chairman.

The CHAIRMAN. Now, do you feel that U.S. magistrates are properly utilized, or should they be given a greater role in the judicial system?

Mr. SMITH. Mr. Chairman, that is not easy to answer. Some U.S. magistrates, in my estimation, are underutilized. To be frank, there are some U.S. magistrates who do all they are qualified to do, although they should be able to do more. That situation is improving because with the improvements in pay and benefits U.S. magistrates have received in the last few years, better people are seeking out that position. As an example, the district judge who has been serving Waco for the last 1½ years inherited a very overloaded docket. He has used me to the fullest extent—as I mentioned, I have tried several civil trials, jury trials, by consent—to the extent that in 1½ years, the pending docket in Waco has been reduced from about 210 cases to about 50.

The CHAIRMAN. Judge, I believe you were the first judge on a special court for teenage traffic violators; is that correct?

Mr. SMITH. Yes, it is.

The CHAIRMAN. These individuals would volunteer to appear before a jury of their peers and accept constructive educational punishment rather than simply paying a fine. Would you give us your thoughts on the benefits of such a system and how this concept might be applied in other jurisdictions?

Mr. SMITH. Mr. Chairman, that was set up as a project of the Junior Bar Association in Waco, I believe, in 1968. It had many advantages. The young offender did not have to pay a fine if he successfully completed the constructive punishment program set up for him. His parent or himself did not have their insurance rates increased because there was no actual conviction. But most importantly, we felt at the time that the first and sometimes the only contact people had with any part of the judicial system was when they appeared in traffic court, and more often than not, that created a bad impression. So this court was set up to function much more informally than any court in our county. It was the only court for years where the judge wore a robe, the whole purpose being to impress the young, 18 and under, offender with the justice system itself and how it could be beneficial to them and at the same time to have them learn something about driving habits that would be beneficial to them. I really do not know that that could be expanded to any larger jurisdiction. It could be expanded to many other places; as a pilot program in 1968, it was obviously successful, because it is still in existence in Waco today.

The CHAIRMAN. Judge, I think those are all the questions I have for you. I want to wish you a happy tenure of service on the bench.

Mr. SMITH. Thank you, Mr. Chairman.

The CHAIRMAN. We hope to get these nominations out tomorrow if the Democrats go along and do not object.

I understand Mr. John McCamish of Texas was here to speak on your behalf, but he had to leave; I just want the record to show that.

I believe Senator Bentsen has approved your blue slip of approval, as well.

Next is William D. Keller, of California. Please have a seat, Mr. Keller.

TESTIMONY OF WILLIAM D. KELLER, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

The CHAIRMAN. Do you have any family or friends here you would like to introduce?

Mr. KELLER. No, I do not, Senator.

The CHAIRMAN. Senator Wilson could not be here, but I believe he recommended you for this position, and he has a statement that he wanted me to put in the record in your behalf. So at this time, we will place his statement in the record. If you wish a copy of the statement, you are welcome to get it from staff.

We will also place in the record a copy of your résumé.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR PETE WILSON

Mr. Chairman, today the committee considers the nomination by the President of the United States of William Keller to be United States District Court Judge for the Central District of California. I appreciate the courtesy of the chairman in inviting me to appear here today to introduce this nominee, and I respectfully encourage prompt and favorable action on the appointment.

Mr. Keller is a highly talented and respected attorney who has more than 20 years experience in private and public practice in the district on whose bench he will soon serve.

Following enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, I asked my Judicial Qualification Committee in California to recommend to me prospective judges for the newly created seats on the bench. Rather quickly, that committee sent me a powerful endorsement of William Keller as being extremely well qualified. After receiving his credentials and record, I wholeheartedly concur, and am pleased that President Reagan has accepted my recommendation that Mr. Keller be appointed.

William D. Keller is a native of Los Angeles, California. He earned his undergraduate degree from the University of California (Berkeley) in 1956 and his bachelor of laws from University of California at Los Angeles in 1960. He then began his distinguished career of public service as Assistant United States Attorney in the Central District, with responsibility for a wide variety of criminal cases. For eight years, he served in the respected firm of Dryden, Harrington, Horgan & Swartz, first as Associate, then as partner, pursuing both tort and commercial litigation.

Mr. Keller returned to the public sector as United States Attorney, appointed first by President Nixon and then by President Ford. During this time, he clearly demonstrated his legal acumen and leadership abilities.

From 1977 to present, Mr. Keller was again in private practice, first as a partner in Rosenfeld, Meyer & Susman, then in solo practice, and since 1981 as partner with Hahn & Cazier. During these seven years, William Keller achieved wide acclaim for his expertise in litigation. Indeed, he is now partner in charge of his firm's litigation section. His peers rate him as one of the ablest individuals who might be appointed to the bench.

In addition to William Keller's active legal practice, he maintains an impressive array of public service activities. Among these, Mr. Keller is an instructor at the Trial Advocacy Institute of the University of Southern California and a lawyer delegate to the Ninth Circuit Judicial Conference in California's Central District. He has also taught at the Attorney General's Advocacy Institute in Washington, DC and for California's Continuing Education of the Bar.

In short, Mr. Chairman, Bill Keller has earned the admiration of his peers and public officials for his dedicated and quality professional services rendered in public and private practice. After almost a quarter century of such activities, he has agreed to apply his expertise from the other side of the bench. I firmly believe that President Reagan has made an excellent decision in this appointment, and that the people of California and the Nation will be well served. As the committee reviews Mr. Keller's background, I am confident that you will share my assessment. The work load confronting the Central District is indeed staggering, and William Keller, with his strong qualifications, will be a welcome addition to the court.

I urge the committee to report this nomination in the most favorable light, and to do so soon so that Senate advice and consent may be secured and Judge Keller's service commenced.

The CHAIRMAN. Mr. Keller, I believe you served as U.S. attorney out there for 5 years.

Mr. KELLER. I did.

The CHAIRMAN. And you are in private practice now?

Mr. KELLER. That is correct, Mr. Chairman.

The CHAIRMAN. Mr. Keller, would you please describe the arrangements you have made to dissolve your financial interest in your law firm; what time period is involved, and what arrangements you have made to be compensated for your work on pending litigation?

Mr. KELLER. Mr. Chairman, the partnership agreement provides for resignation by a partner. In the event that there is a resignation, the moneys that he will receive are fixed as of the date of the resignation, so that I would not participate thereafter.

The CHAIRMAN. That will take effect at the time that you become a judge.

Mr. KELLER. That is correct, Senator.

The CHAIRMAN. Mr. Keller, seeing that many drug dealers when arrested are able to pay bond money easily, and in some cases, leave the country to resume their activities elsewhere, what changes, if any, in bail reform do you feel should be implemented in order to deter this type of activity?

Mr. KELLER. Mr. Chairman, I have not dealt with the Bail Reform Act in some time, as I indicated to Mr. Short. However, I can tell you that I feel that in the event that you have a drug dealer who is a fairly significant individual, that the bail should reflect the severity of the charged crime. So I think that they should be most careful in setting bail for people who are a risk to be a fugitive.

The CHAIRMAN. Mr. Keller, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does this phrase, "judicial activism", mean to you?

Mr. KELLER. It means inappropriate conduct on the part of a judge. I do not think it is appropriate at all. I think that they are there to decide the dispute.

The CHAIRMAN. Do you favor letting the States and local communities run their own institutions, such as schools, hospitals, and other institutions?

Mr. KELLER. I feel quite strongly about that; I do favor it.

The CHAIRMAN. Some judges have taken over these institutions and attempted to levy taxes and give orders and take steps that are entirely inappropriate for a Federal judge. And I am glad to hear you say that you feel as you do about it.

I think those are all the questions I have. I just want to wish you a happy tenure of service on the bench.

Mr. KELLER. Thank you, Mr. Chairman.

The CHAIRMAN. Our next appointee is Mr. Ronald E. Meredith, of Kentucky. Please come forward, Mr. Meredith.

TESTIMONY OF RONALD E. MEREDITH, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY

The CHAIRMAN. Mr. Meredith, I believe you are now U.S. attorney in Kentucky, aren't you?

Mr. MEREDITH. Yes, sir, I am.

The CHAIRMAN. Do you have any of your family or friends here that you would like to introduce to the committee?

Mr. MEREDITH. Yes, Senator, I do. My wife, Jody, is standing up back there. As a matter of fact, I met her when she was Senator "Scoop" Jackson's receptionist, and I was working for Senator Cooper. And my three daughters are here today—Kelly, Jaime, and Ronee—and my sister-in-law, Ruth Berry, is also here.

The CHAIRMAN. We are very glad to have all of them here.

Incidentally, Senator Marlow Cook spoke to me about you this morning; he had to leave before the hearing, but he recommended you very highly.

Mr. MEREDITH. Thank you, sir.

The CHAIRMAN. Without objection, we will place your résumé in the record.

Mr. Meredith, I believe you served as minority counsel for the Judiciary Committee's Subcommittee on Penitentiaries, as well as legislative assistant to former Senator Cook, didn't you?

Mr. MEREDITH. That is correct, Senator.

The CHAIRMAN. At present, you are the U.S. attorney for the Western District of Kentucky. Now, how have these jobs prepared you for the challenging task that lies ahead as a U.S. district court judge?

Mr. MEREDITH. Mr. Chairman, first of all, when I was here as counsel to the Senate Judiciary Subcommittee, I dealt with the criminal justice system every day and had the opportunity to sit on that back wall oftentimes and discuss H.R. 1 and other criminal legislation which is still pending, I believe—I worked on it 12 years ago.

The CHAIRMAN. I hope we get it passed one of these days.

Mr. MEREDITH. Me, too. And, as U.S. attorney, I have been responsible for some 5,000 cases in the last 3 years, probably involving up to 30 defendants and multimillion-dollar drug conspiracies all the way to multimillion-dollar Federal Tort Claim Act cases on the civil side. I believe that has prepared me well for the bench.

The CHAIRMAN. Now, I believe judicial temperament to be a prerequisite for a Federal judge. I have seen some Federal judges embarrass witnesses and jurors and others in the courtroom, even attorneys, and I think it is just inexcusable. I wonder how you feel about this?

Mr. MEREDITH. I agree with you, Mr. Chairman. And I have made the statement in times past that if I should ever become a

Federal judge, I will remember that I was appointed and not annointed.

The **Chairman**. A Federal judge has all the power in the world anyone would need or care to have, and in a few instances, I have seen them abuse that power. I think it is important that they restrain themselves. The more power a man has, the more humble he ought to be.

Mr. **Meredith**. Yes, sir. May I add something to that, sir? Abraham Lincoln said that the true test of a man's character is not how he handles adversity—almost anyone can handle adversity—but the true test of a man's character is how he handles power. I concur with that.

The **Chairman**. I think there is a lot of truth in that.

Mr. Meredith, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decision-making, and what are the criteria that you would consider in resolving whether or not a decision was the type that should be made by a judge as opposed to an elected legislative body?

Mr. **Meredith**. Mr. Chairman, I think a judge should interpret the law and not involve himself in lawmaking. That is for those of you who are members of Congress to do. In my opinion, a judge should be concerned only with the case in controversy and not use that particular case as an excuse to enact some kind of far-ranging social policy.

I therefore think that a Federal judge should use what is commonly referred to as judicial restraint.

The **Chairman**. I think those are all the questions I have. I wish you a happy tenure of service on the bench.

Mr. **Meredith**. Thank you, sir.

The **Chairman**. I sincerely hope we can get action on these judges right away. If we can get the cooperation of the committee tomorrow, we could get them out of here even tomorrow.

Thank you very much.

Mr. **Meredith**. Thank you.

The **Chairman**. Our next appointee is F.A. Little, Jr., of Louisiana. Mr. Little, please come around.

You have been endorsed by Senator Johnston here. And Senator Russell Long could not be here, but he has sent a statement in your behalf, endorsing you. Senator Long is one of the senior Senators, and is held in high esteen by the other members of this body. His endorsement, along with Senator Johnston's, of course, means a great deal to you.

Without objection, we are going to place your résumé in the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR RUSSELL B. LONG

Mr. Chairman and members of the Judiciary Committee, I am very pleased to submit for the record a brief introduction of F.A. Little, Jr., nominee for United States District Court for the Western District of Louisiana. I recommend him very highly to the Committee.

Mr. Little is presently a named partner in the highly respected Alexandria, Louisiana law firm of Gold, Little, Simon, Weems and Bruser, P.C. He is a Graduate of Tulane University Law School in 1961, and Tulane University in 1958.

Upon graduation from Tulane Law School, Mr. Little joined the prominent New Orleans law firm of Chaffe, McCall, Phillips, Tolar and Sarpy as an associate. In 1965, he joined the Alexandria, Louisiana law firm of Gold, Hall and Syke as an associate, and was made a partner in 1969. The firm is now Gold, Little, Simon, Weems and Bruser. Mr. Little serves as the president of the law corporation and as one its directors.

Mr. Little is a member of the Louisiana Bar Association, the American Bar Association, and a past president of the Alexandria Bar Association. He has also served as a lecturer to the Louisiana Tax Conference and has participated in professional development courses for Louisiana certified public accountants and continuing legal education programs for the Louisiana State Bar Association. He is also a part time instructor at the Tulane University Law School.

Because of his distinguished years of service to the legal profession as a practicing attorney, Mr. Little is very well qualified to perform the duties of United States District Court Judge and I strongly urge the Committee to approve his nomination.

TESTIMONY OF F.A. LITTLE, JR., NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF LOUISIANA

The CHAIRMAN. You were admitted to the bar in 1961, I believe, and you are practicing now in a private law practice?

Mr. LITTLE. Yes, Mr. Chairman.

The CHAIRMAN. I notice you were born in Minneapolis, MN. How did you get to Louisiana?

Mr. LITTLE. I was told that was where I was born. I think my parents lived there 6 months and moved after that.

The CHAIRMAN. They were from Louisiana, originally?

Mr. LITTLE. No.

The CHAIRMAN. Where is your legal residence?

Mr. LITTLE. Alexandria, LA. That is where I live.

The CHAIRMAN. Would you like to introduce any of your family or friends who are here?

Mr. LITTLE. Yes, Mr. Chairman. My wife, Gail, is here with me.

The CHAIRMAN. We are very pleased to have you with us.

Mr. Little, how would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator, or was not adequately prepared to represent the interests of his or her client?

Mr. LITTLE. Well, Senator, sometimes those things that appear to be incompetence may be sly traps set by a lawyer. But if it appeared that the man was incompetent, I think it is up to the court to try to elicit from the witnesses information and evidence to help the court make a decision.

The CHAIRMAN. Mr. Little, you have been a practicing attorney since 1961, I believe.

Mr. LITTLE. Yes, sir.

The CHAIRMAN. Would you tell the committee approximately how many criminal cases you have participated in during this period?

Mr. LITTLE. Mr. Chairman, that is hard, going back to the days when I practiced in New Orleans, but I would say easily over 500 criminal trials.

The CHAIRMAN. And how many civil cases?

Mr. LITTLE. Oh, I would say 80.

The CHAIRMAN. Mr. Little, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. LITTLE. Well, Mr. Chairman, that is a difficult question, of course, but there has to be some uniformity, evidently, in the decisionmaking process, or at least in the decisions. And the lower courts through the oath, in my judgment, would require the observance of the stare decisis and have to follow those pronouncements from the higher courts, which would be the Supreme Court or the Fifth Circuit Court of Appeals, where we live.

The CHAIRMAN. I presume you would not hesitate, however, if your conscience directed, to make a decision which you felt would bring justice, even though it might be in conflict with some decision?

Mr. LITTLE. No, I would not hesitate to do that.

The CHAIRMAN. Those are all the questions. I hope you have a happy tenure of service on the bench.

Mr. LITTLE. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is Judge William G. Young of Massachusetts. Judge Young, please come forward.

You have already been sworn. Without objection, a copy of your résumé will be placed in the record.

TESTIMONY OF WILLIAM G. YOUNG, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MASSACHUSETTS

The CHAIRMAN. Judge Young, I believe you were born in New York. When did you move to Massachusetts?

Judge YOUNG. Well, I went to school in Massachusetts. I went to college and law school in Massachusetts, and that is where I met my wife, and I have been there ever since. So the first time I moved would have been in 1958, when I commenced schooling in Massachusetts.

The CHAIRMAN. Do you have any members of your family or friends here this morning?

Judge YOUNG. I am honored to introduce you to my wife, Beverly, who is sitting here.

The CHAIRMAN. We are very pleased to have you with us.

I believe you served in the Army for 3 years.

You have been a special assistant attorney general in Massachusetts, haven't you, and chief counsel to the Governor.

Judge YOUNG. Yes, sir.

The CHAIRMAN. You are now an associate justice of the superior court. Is that the highest trial court?

Judge YOUNG. It is, Senator. It is the court of general jurisdiction in Massachusetts.

The CHAIRMAN. Unlimited jurisdiction in criminal and civil cases?

Judge YOUNG. That is correct. It is a common law court.

The CHAIRMAN. Judge Young, would you briefly tell the committee how you will resolve any potential conflicts of interest, including the procedure you will follow in determining these areas of concern?

Judge YOUNG. Mr. Chairman, it seems to me that the administration of justice must be accompanied by the appearance that justice is being administered. Therefore, I take your question asking me about potential conflicts of interest as casting the net fairly broadly, and I agree with that. In all such instances, it seems to me that the judge ought recuse himself or herself from sitting on such a case. The way I would intend to address this issue, were I to be confirmed in this position, would involve keeping a close track of whatever holdings I may have—my stockholdings are minimal—and to avoid whatever potential conflicts might arise by recusing myself from such cases. I also intend to avoid sitting on any cases in which the law firm with which I was formerly associated might be representing clients; to recuse myself from those cases. That does not seem to be a burden in a court of 10 district judges.

The CHAIRMAN. Judge, in reviewing the Judiciary Committee questionnaire, I noted that in responding to a question concerning judicial activism, you stated:

> One of the great balances of our constitutional form of government is that the law has been established by others through a written Constitution and the laws passed by the Congress of the United States.

Judge, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Judge YOUNG. The short answer is "No." The intellectual exercise that is imposed on the judicial office, in my view, is one that involves ascertaining the intent of the framers and then scrupulously following it.

Now, with the Constitution, the Constitution is a living instrument, and therefore it may not be clear—self-evident, anyway—what the intent of the framers with a specific constitutional issue might be. In those circumstances, it seems to me the judge is required to address what the intent of the framers would have been were they confronted with such an issue and then follow that intent.

The CHAIRMAN. Judge, we passed a bill through the Senate here, a sentence reform bill, in which we provide for a commission to handle the guidelines, and it would provide that a judge, in sentencing an individual, could not go below or above those guidelines unless he explains his reasons.

The thought behind that is that some judges may give 2 years, and others may give 20 years for the same offense, and to try to treat the criminals on a more equitable basis, we felt this would be helpful.

How would you feel about that?

Judge YOUNG. I strongly endorse it, Mr. Chairman.

In the superior court of Massachusetts, lacking any such legislation in our Commonwealth, we have developed a sentencing guideline structure for our own use, and it has the same approach. It quantifies the particular crimes that may come before the court, and if the judge goes either above the guidelines or below, the judge is required to state the grounds for such a sentence. We have found that that works very well. It does not inhibit the judge. It is not a mandatory requirement. But it does tend to promote uniformity of sentencing, and it is very helpful.

The CHAIRMAN. I think those are all the questions I have. I hope you have a happy tenure of service on the bench.

Judge YOUNG. Senator, I am honored to be here, and thank you.

The CHAIRMAN. Next is Judge La Plata, of Michigan.

Judge La Plata, please come forward.

TESTIMONY OF GEORGE LA PLATA, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN

The CHAIRMAN. Judge, I believe you are the Oakland County Circuit Court judge.

Judge LA PLATA. Yes, sir.

The CHAIRMAN. Is that a court of unlimited jurisdiction, the highest trial court in the State?

Judge LA PLATA. Yes; it is the highest trial court in the State of Michigan.

The CHAIRMAN. Do you have the power of capital punishment in criminal cases, and unlimited in civil?

Judge LA PLATA. Yes.

The CHAIRMAN. Or, do you have capital punishment in Michigan?

Judge LA PLATA. We do not have capital punishment. We have life imprisonment, natural life.

The CHAIRMAN. Without objection, we will place your résumé in the record.

Judge LA PLATA. Thank you.

The CHAIRMAN. Mr. La Plata, do you have any family or friends here that you would like to introduce?

Judge LA PLATA. No; I do not, Senator, but thank you.

The CHAIRMAN. Now, does your court have unlimited civil jurisdiction, or limited to a certain degree?

Judge LA PLATA. Unlimited, Senator; unlimited civil jurisdiction.

The CHAIRMAN. I understood maybe it was $10,000 or more.

Judge LA PLATA. Well, it is $10,000 or more.

The CHAIRMAN. I guess you have a magistrate or a lower judge——

Judge LA PLATA. Yes; we do. We call them district judges in the State of Michigan.

The CHAIRMAN. Now, you do not think you will have any trouble in making the transition from State judge to a Federal judge, do you?

Judge LA PLATA. No; none at all, Senator.

The CHAIRMAN. Oakland County, I believe, has a population in excess of 1 million inhabitants, and I understand that in 1983, you disposed of 1,853 cases, which exceeded the number of new cases started in that year. I want to commend you and congratulate you on this accomplishment.

Now, what, in your opinion, is needed to speed up the distribution of Federal cases? Would it be more judges, magistrates; longer hours for the judges; changing the criminal procedure, or what?

Judge LA PLATA. Senator, when I took the bench, I made a practice of being on the bench at 8:30 every morning and following one case with another case. I think that if all judges and all courts do that, that takes care of the backlog. I think nothing of having one jury deliberating while I am already picking another jury and starting on a second case. I do that all the time.

The CHAIRMAN. Evidently, you are not afraid of hard work, and that is what gets rid of dockets, isn't it?

Judge LA PLATA. Yes, sir, it certainly does.

The CHAIRMAN. I wish all of our Federal judges felt that way about it, and we could clean these dockets up. That would mean going maybe from 9 or 10 until 5 if they still have plenty of work to do. These dockets ought to be kept up. It is not fair to the litigants to have to wait for weeks, months, and years to have cases heard.

Judge, what are the standards that you would use in deciding that a court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Judge LA PLATA. Well, I have always felt, Senator, and I have always indicated that I do not think that judges have any particular expertise in anything other than the law. So the only thing I think of is making a decision in a case and letting it go.

The CHAIRMAN. I think those are all the questions I have for you, Judge. I want to wish you a happy tenure of service on the bench.

Judge LA PLATA. Thank you.

The CHAIRMAN. I believe that completes the hearings of the seven judges we have today, and in view of that, we will now stand adjourned.

[Whereupon, at 10:40 a.m., the committee was adjourned.]

BIOGRAPHIES

R. ALLAN EDGAR

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF TENNESSEE

Birth: October 6, 1940, Munising, MI.

Legal residence: Tennessee.

Marital status: Married to Frances Martin Edgar, 2 children.

Education: 1958-62—Davidson College, A.B. degree; 1962-65—Duke University School of Law, LL.B. degree.

Bar: 1965—Tennessee.

Military service: 1965-67—U.S. Army.

Experience: 1967—present—Miller & Martin, Associate (1967-1972), Partner (1972-President); 1971-72—Member, Tennessee House of Representatives.

WALTER S. SMITH, JR.

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF TEXAS

Birth: October 26, 1940, Marlin, TX.

Legal residence: Texas.

Marital status: Married to Jill Jost Smith, 2 children.

Education: 1958-60—University of Texas, 1961-64—Baylor University, B.A. degree; 1965-66—Baylor University, LL.B. degree.

Bar: 1966—Texas.

Experience: 1966-69—Dunnan & Dunnan, associate; 1969-78—Wallace & Smith, Partner; 1978-80—Fulbright, Winniford, Bice & Marable, Partner; 1980-82—Judge, 54th Judicial District Court of McLennan County, TX; 1983 to present—United

States Magistrate, Western District of Texas (part-time); 1983 to present—Vaughn, Terrell, Lynn & Crowden, partner.

WILLIAM D. KELLER

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: October 29, 1934, Los Angeles, CA.

Legal residence: California.

Marital status: Divorced, 3 children.

Education: 1952-56—University of California, B.S. degree, 1957-60—University California Los Angeles, LL.B. degree.

Bar: 1961—California.

Experience: 1961-64—Assistant U.S. attorney, Southern District of California; 1964-72—Dryden, Harrington & Swartz, associate and partner; 1972-77—U.S. attorney, Central District of California; 1977-78—Rosenfeld, Meyer & Susman, partner; 1978-81—Private Practice, Los Angeles, Ca.; 1981 to present—Hahn & Cazier, partner.

RONALD E. MEREDITH

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY

Birth: January 30, 1946, Clarkson, KY.

Legal residence: Kentucky.

Marital status: Married to Joanne Marie Berry Meredith, 4 children.

Education: 1963-67—Georgetown College, B.A. degree; 1967-71—National Law Center, George Washington University, J.D. degree.

Bar: 1971—Kentucky; 1971—District of Columbia.

Experience: 1971-72—U.S. Senate Judiciary, Subcommittee on National Penitentiaries, Minority counsel; 1972-75—Legislative assistant, U.S. Senator Marlow W. Cook; 1975-81—Kelley & Meredith, partner; 1981 to present—U.S. attorney, Western District of Kentucky.

F.A. LITTLE, JR.

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF LOUISIANA

Birth: October 26, 1936, Minneapolis, MN.

Legal residence: Louisiana.

Marital status: Married to Elizabeth Cox Little, 2 children.

Education: 1954-58—Tulane University, B.A. degree; 1958-61—Tulane University Law School, LL.B. degree.

Bar: 1961—Louisiana.

Experience: 1961-65—Chaffe, McCall, Phillips, Tolar & Sarpy, associate; 1965 to present—Gold, Little, Simon, Weems & Bruser, Ltd. (formerly Gold, Hall & Skye), associate (1965-69) Partner (1969 to present).

WILLIAM G. YOUNG

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF MASSACHUSETTS

Birth: September 23, 1940, Huntington, NY.

Legal residence: Massachusetts.

Marital status: Married to Beverly Bigelow Young, 3 children.

Education: 1958-62—Harvard College, A.B. degree; 1964-67—Harvard Law School, LL.B. degree.

Bar: 1967—Massachusetts.

Military service: 1962-65—U.S. Army.

Experience: 1967-68—Law Clerk, Hon. Raymond S. Wilkins, Massachusetts Supreme Court; 1968-72—Bingham, Dana & Gould, associate; 1970-72—Special assitant attorney general, Commonwealth of Massachusetts; 1972-74—Chief counsel to the Governor, Commonwealth of Massachusetts; 1975-78—Bingham, Dana & Gould associate (1975), partner (1975-1978); 1978 to present—Associate justice; Superior Court, Commonwealth of Massachusetts.

George La Plata

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN

Birth: October 17, 1924, Detroit, MI.

Legal residence: Michigan.

Marital status: Married to Frances Hoyt La Plata, 2 children.

Education: 1947-51—Wayne State University, A.B. degree; 1951-56—Detroit College of Law LL.B. degree.

Bar: 1956—Michigan.

Military service: 1943-46 1952-54—U.S. Marine Corps.

Experience: 1956-62—Law offices of George Menendez; 1962-72—La Plata, Finnen & Koscinski, partner; 1972-79—Private practice, West Bloomfield, MI; 1979 to present—Judge, Oakland County Circuit Court.

CONFIRMATION HEARING ON:

EDITH H. JONES, HERMAN J. WEBER, JOSEPH H. RODRIGUEZ, AND THOMAS J. AQUILINO, JR.

WEDNESDAY, SEPTEMBER 26, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:52 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: Robert J. Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

We have met this morning to have a hearing on certain judges that have been appointed by the administration. The first is for U.S. circuit judge, Edith H. Jones, of Texas, to be U.S. circuit judge for the fifth circuit.

I think we might swear all of these judges at one time, if you will stand up and raise your hands.

Do you solemnly swear that the testimony you shall give in this hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

Ms. JONES. I do.

Judge WEBER. I do.

Mr. RODRIGUEZ. I do.

Mr. AQUILINO. I do.

The CHAIRMAN. I see the able and distinguished Senator from Texas here, Senator Tower. Senator Tower, did you care to make a statement?

STATEMENT OF THE HON. JOHN TOWER, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator TOWER. Yes, Mr. Chairman. Thank you very much. I appreciate the opportunity to appear here this morning and present Edith H. Jones, who has been nominated by the President to the U.S. Circuit Court of Appeals for the Fifth Circuit.

Edith Jones is a native of Philadelphia, PA, who has made Texas her home. She received her bachelor of arts degree from Cornell University in 1971. She then attended the University of Texas where she received a juris doctorate in 1974.

Since that time, she has been an associate and partner in the distinguished law firm of Andrews & Kurth in Houston, TX. Edith has the commitment and dedication to the legal profession to be a very fine judge. Throughout her tenure with Andrews & Kurth, she has established a reputation of fairness and professionalism which is recognized and respected by her peers.

In addition to her legal experience, she manifests all the qualities necessary as a member of the Federal bench. Mr. Chairman, in my view, if Edith Jones is confirmed by the Senate, she will bring these same outstanding qualities to the Federal bench, and I am confident of her ability to assume this important position.

This nomination signifies the commitment of this administration to appoint the most qualified jurists to our Federal judiciary. I believe that Edith Jones can and will fulfill the enormous responsibility of providing a fair and impartial system of justice, a right guaranteed by our Constitution to the general citizenry.

Therefore, I recommend, Mr. Chairman, without reservation or qualification, that you approve the nomination of Edith Jones to this important position and I would hope that the Committee would seek early expedition of confirmation.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Tower. Senator, we are glad to have you stay, but if you are busy, we will understand if you retire. I just want to say to Ms. Jones that she is fortunate to have such an experienced and able Senator, Senator Tower, here to endorse her.

Did you recommend her originally, Senator Tower, for this position?

Senator TOWER. Yes, Mr. Chairman.

The CHAIRMAN. I notice Senator D'Amato is here, too, and to save these Senators' time, if you want to come up and make your statement about your judge, I think we had better take it before we start the questioning.

Ms. Jones, if you will just retire a minute and let Senator D'Amato come up?

Let us see; Thomas J. Aquilino, of New York, to be a judge of the U.S. Court of International Trade.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Mr. Chairman, thank you very much for giving me this opportunity of introducing Mr. Aquilino, whom I have had the opportunity to speak to and to converse with over a period of time. I have also had the opportunity to review his record and speak to those who know of him and his distinguished legal career with the very fine firm of Davis, Polk & Wardwell.

Mr. Aquilino is a lifelong resident of our State, having been born in Mount Kisco and still residing in Westchester County, in Pelham, NY. He is married, has three children, has attended a number of universities.

He received his undergraduate degree with honors from Drew University, and thereafter his law degree from Rutgers University. He was admitted to the bar in 1973. He has clerked for the distinguished jurist in the Federal District Court, Southern District, Judge Cannella.

He is known as an expert in constitutional law, and I can think of very few with better academic achievements and a more scholarly approach to the law who would be an outstanding credit to the U.S. Court of International Trade.

I say this after having observed that I did not recommend Mr. Aquilino to the White House, but that the Justice Department and others brought to my attention a young man of extraordinary legal capabilities, and I believe a man of great integrity who will serve this Nation well in this most important position.

So I unqualifiedly endorse him and I hope that he will be approved by this committee.

The CHAIRMAN. Senator, did you recommend him in the beginning?

Senator D'AMATO. No. I have to confess to the chairman that I did not. However, I have had the opportunity to meet with people who know him. He has clerked with a good friend of mine, a distinguished jurist, Judge Cannella, who has the highest recommendation and regard for his integrity, for his scholarship.

He works with a great law firm that gives him some of the highest recommendations, and I give him my unqualified and my wholehearted support.

The CHAIRMAN. Then you do recommend him now?

Senator D'AMATO. Yes; I certainly do.

The CHAIRMAN. Well, I want to say to Mr. Aquilino that you are fortunate to have Senator D'Amato to recommend you. He is a very able Senator and held in high esteem here, and his endorsement will go a long way for you.

Thank you very much, Senator. You are welcome to stay or you can leave if you wish.

Senator D'AMATO. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senators Bradley and Lautenberg, please come up. Senator Bradley, we will be glad to hear from you.

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator BRADLEY. Thank you very much, Mr. Chairman. It is an honor to come before you today and I am pleased to introduce to you and the committee a highly respected member of the New Jersey bar, Joseph Rodriguez, who comes before the committee as a nominee for the Federal judiciary.

Joseph Rodriguez has earned a reputation as an independent, fair and relentless defender of the law. He has served three separate Governors of New Jersey. In the Republican administration of William Cahill, Mr. Rodriguez chaired the State's board of higher education. In the Democratic administration of Brendon Byrne, Mr. Rodriguez was tapped to chair the State commission of investigation. And in the current Republican administration of Thomas Kean, he serves as the State's public advocate.

The fact that his talents have been so broadly recognized is a tribute to his professionalism. The members of the Judiciary Committee know that I have a deep concern about the quality of our

Federal judiciary. These are lifetime appointments. The people we choose will, in large part, determine whether the people have faith in the most basic part of our democracy, the sanctity of our Constitution, the freedoms it grants, and the laws that give it strength.

Joseph Rodriguez is highly qualified to fulfill that obligation. As chairman of our State commission of investigation, he was charged with the responsibility of ensuring the highest ethical standards from our State's public servants. He performed that job with great conviction.

Currently, Mr. Rodriguez is the people's defender, the person who ensures that the public's rights are not trammeled upon, and he has performed that role with great conviction. These two assignments have called for strict standards and compassion. Both qualities are also essential for a member of the Federal judiciary.

Finally, Mr. Chairman, I would be remiss if I did not also note that the appointment of Mr. Rodriguez also broadens the ability of our Federal judiciary to be truly representative of the entire community.

I do not know how many other members of the Federal judiciary are of Hispanic descent. In the district which includes New Jersey, the latest census records nearly 7 percent of the population of Hispanic origin, and there are no members of the Federal judiciary who are of Hispanic descent.

Mr. Rodriguez' appointment will certainly be welcomed by all who would like to see the judiciary more inclusive of the entire community.

Mr. Chairman, it is my privilege to introduce Joseph Rodriguez to the Judiciary Committee and to join with my colleague, Senator Lautenberg, to recommend his prompt approval by the full Senate.

The CHAIRMAN. Thank you very much.

Senator Lautenberg, we will be glad to hear from you.

STATEMENT OF HON. FRANK LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman. I, too, am pleased to introduce Mr. Joseph Rodriguez and to express my support of his nomination to the district court of New Jersey.

Mr. Rodriguez is an experienced and skilled trial lawyer. He brings to the bench an impressive record of service to the bar of New Jersey and to the public at large. He has served in high posts in State government under Democratic and Republican administrations.

He chaired the State commission on investigations, charged with investigating and finding ways to rid our State of organized crime. He was chairman of the board of higher education. He currently serves as public advocate in New Jersey. As such, he is the chief of the State public defender's office, and also head of a unique State department empowered to represent consumer interests before utility and insurance ratemakers, to represent the interests of the mentally disabled, and to represent the general public interest in litigation.

These are broad responsibilities which Mr. Rodriguez has discharged with care, sensitivity and a keen sense of justice. It is just one measure of the esteem in which his peers hold him that Joe Rodriguez has served as president of the State bar association. He is an associate editor of the New Jersey Law Journal. He taught trial practice at Rutgers' Camden Law School campus for 10 years.

His contributions have not gone unrecognized. He has received awards from various public service organizations, including the ACLU, the Girl Scouts of America, the Hispanic Bar Association, and the American Legion.

He has honorary degrees from Rutgers, Seton Hall University, and St. Peter's College. Joe Rodriguez, I would add, would be the first Hispanic member of the Federal bench of New Jersey, as Senator Bradley has pointed out, and his high achievement already serves as a model for others.

His appointment would increase the diversity of the bench, and I believe that enhances the respect it commands from the public which it must judge. Confirming Joe Rodriguez, I think, adds a great deal more. It would add a highly regarded, sensitive, intelligent attorney to the Federal court.

New Jersey has reason to be proud of this nomination and I recommend Joe Rodriguez to you and urge his speedy confirmation.

The **CHAIRMAN**. Thank you very much, Senator.

Mr. Rodriguez, I want to congratulate you on being appointed district judge by President Reagan. I also congratulate you for having the high endorsement of both of the New Jersey Senators here. The New Jersey Senators are both able men; they are held in high esteem by the Senate and their colleagues.

Now, gentlemen, you all are excused if you want to go, or you can remain if you like.

Senator **LAUTENBERG**. Thank you, Mr. Chairman.

The **CHAIRMAN**. Congressman DeWine and Judge Weber, of Ohio, will you have a seat? We will be glad to hear from you at this time, Congressman.

STATEMENT OF HON. MICHAEL DeWINE, A U.S. REPRESENTATIVE FROM THE STATE OF OHIO

Mr. **DEWINE**. Thank you very much, Mr. Chairman. It is my personal pleasure to appear in front of you and this committee today, and my pleasure to be here in support of the nomination of Judge Herman J. Weber and introduce him to this committee.

Judge Weber has served on the bench for over 25 years in Ohio. He served for several years in the municipal court and then for 21 years as the common pleas court judge in my home county, Greene County. In Ohio, the common pleas judge is the trial court of record in the State.

He has served for the last 2 years on the appellate court in our State. Mr. Chairman, I am particularly pleased to be here this morning because it has been my pleasure to serve in the court that Judge Weber has presided over for a number of years.

When I first got out of law school, my first job was as an assistant prosecuting attorney, and the first case I ever tried was in front of Judge Weber. After that, I was prosecutor and tried literally hundreds of cases in his court.

He is not only a well-respected legal scholar, Mr. Chairman, but I think probably even more important, he is a judge that I can personally tell you demonstrates a tremendous amount of good commonsense.

His probing questions at trial, his questions to the attorneys prior to the trial, always get to the heart of the case. And I think that because he has been nominated on the district court level, it is very important that we have a judge who has good trial experience, and Judge Weber has that, and he has the good commonsense that I think will be an asset to the Federal bench.

He also has one other quality that I think is very important, Mr. Chairman, and that is that he does come and is a product of the county court system and the State court system. I think he will be very sensitive to the power that can be wielded by a Federal court judge.

So it is my personal pleasure, Mr. Chairman, to appear in front of you and to recommend a judge whom I have personally tried many cases in front of, and that is Judge Weber. Thank you very much.

The CHAIRMAN. I want to congratulate you, Judge Weber, on having been appointed by President Reagan, and also congratulate you for the fine recommendation that Representative DeWine has made here of you. Representative DeWine is a prominent Member of the Congress and he is held in high esteem, and I assure you his recommendation will go a long way in your behalf.

Mr. Congressman, we will excuse you if you wish to go, or you can remain if you desire to.

Mr. DEWINE. Thank you very much, Mr. Chairman.

The CHAIRMAN. Ms. Jones, if you will come around, please? Do you have any family or friends here you want to introduce?

TESTIMONY OF EDITH H. JONES, OF TEXAS, NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT

Ms. JONES. I was not able to bring my family. I have a partner from Andrews & Kurth in Washington, Mr. Bruce Coolam, whom I would like to introduce to you.

The CHAIRMAN. Pull the microphone up so we can hear you.

Ms. JONES. I am sorry. Can you hear me?

Mr. SHORT. Bend it down a little bit, if you would.

Ms. JONES. Now, can you hear me?

The CHAIRMAN. Thank you.

Without objection, we will place your résumé in the record.

Now, Ms. Jones, I believe you received your law degree from the University of Texas in 1974?

Ms. JONES. Yes, sir.

The CHAIRMAN. And since then, you have been a practicing attorney for approximately 10 years?

Ms. JONES. Yes, sir.

The CHAIRMAN. You have been nominated now to be a judge for the Fifth Circuit Court of Appeals. That is the highest Federal court next to the Supreme Court of the United States.

Ms. JONES. Yes, sir.

The **Chairman**. How do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibilities of a circuit court judge?

Ms. **Jones**. Senator, I am very honored to have received this at a relatively tender age, although I do not feel too young with two children around the house. But I think I would be better qualified if I were older, but I think my age does not limit my ability to serve as a judge on the fifth circuit.

I have had a wide range of trial experience, from personal injury ranging through commercial litigation of all kinds. I am an active practitioner and have had great experience in the courts, both State and Federal. And from that perspective, I think I would have something to contribute to the bench.

I might add that because of my age, I think I might have a greater modesty about attempting to substitute my judgment for that of duly elected government officials.

The **Chairman**. I believe you informed the committee, and I quote:

> Congress has passed numerous laws whose enforcement is specifically or implicitly left to private plaintiffs and has enhanced the attractiveness of such litigation by creating compensation devices for the attorneys. Congress has rarely overturned the Federal courts' interpretations of jurisdictional and procedural issues.
>
> A conjunction of these sources of power has resulted in a mandate of the Federal courts to rule upon almost all significant areas of public policy. When the courts exercise this mandate, the losing parties and their supporters can always conveniently blame an excessive use of power. This may sometimes be the case. Unless the facts and law applicable to each decision are studied, however, one cannot properly make such a claim.

"Judicial activism," in other words, is a scapegoat phrase that may easily cloud the reality that Federal courts' power has time and again been acquiesced in, ratified and extended by the executive and legislative branches of Government.

Now, Ms. Jones, I believe the phrase "judicial activism" refers to the practice of the judicial branch substituting its own policy preferences for those of elected representatives. That is my opinion.

You indicate that judicial activism is just a scapegoat phrase. Ms. Jones, how would you then describe judges who make decisions that are not within the scope of their authority?

Ms. **Jones**. I would say that was an abuse of power. I do not mean—the three-paragraph statement that was given to me was much broader than what you are saying. I agree with your definition of judicial activism.

I think it is a fact that the Federal courts do exercise great power because it is given to them under decisions of the Supreme Court and under laws that Congress enacts. But I do not believe that their role should invade the province of the legislature. I do not believe that they should interpret new remedies and rights into the Constitution that were not there when the Founding Fathers created it, and I do not believe that it is their province to run the branches of State government.

The **Chairman**. Some Federal judges have taken over school districts, some have taken over hospitals, some have taken over mental institutions, and some have taken over other institutions of the State government and of local governments.

To me, this is very repulsive. We have got three branches. The Congress makes the law. The executive branch administers the law. The judicial interprets the law. How do you feel about that?

Ms. JONES. I do not know the facts and the law applicable to those cases. My general background and principles would lead me to say that I would agree with you.

The CHAIRMAN. Ms. Jones, what do you understand by the term "American federalism," and to what extent, in your view, is the 10th amendment to the Constitution an affirmative grant of authority to the States?

Ms. JONES. I believe that the Constitution clearly creates a Federal system in the narrow sense, which means that there is a Federal Government with its sphere of authority and that the States are sovereign within their spheres of authority. Therefore, I think the 10th amendment is an enforceable delegation or conferring of authority upon the States.

The CHAIRMAN. Well, now, did the Federal Government give the States their authority and confer authority on them, or did the States create the Union and give it its authority and reserved all other powers to themselves?

Ms. JONES. I think it is fair to say that the latter was what historically happened.

The CHAIRMAN. Well, that is clear, is it not?

Ms. JONES. Yes, sir.

The CHAIRMAN. We had no Federal Government until the Constitutional Convention met in 1787, and when they adopted the Constitution they delegated certain powers to the Union, and only certain powers, and those are all the powers they have got today, except amendments to the Constitution since the Constitution was adopted. All other powers reside with the States under the Constitution, and that is the very point that so many Federal judges seem to overlook.

Ms. JONES. I think that is often the case.

The CHAIRMAN. Is there anything else you would like to speak about, Ms. Jones?

Ms. JONES. No, sir.

The CHAIRMAN. Thank you very much. That completes the questions I have of you. Thank you.

Ms. JONES. Thank you.

The CHAIRMAN. Judge Weber of Ohio, would you have a seat, please?

Judge, do you have any family or friends here you would like to introduce?

TESTIMONY OF HERMAN J. WEBER, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF OHIO

Judge WEBER. Thank you, Mr. Chairman. I would introduce my wife, Barbara Rice Weber, who is a teacher in the Fairborn City school system; and my friend, Dan Hamilton, who is vice chairman of the Montgomery County, OH, Republican Party. They are seated in the back of the courtroom.

The CHAIRMAN. We are glad to have you all with us.

Without objection, Judge, we will place your résumé in the record.

The common pleas court in Greene County—does that have unlimited jurisdiction in criminal and civil matters?

Judge **Weber**. Yes, sir, except for a few; $500 or less cannot be tried there.

The **Chairman**. Do you have capital punishment now?

Judge **Weber**. Yes, we have capital punishment at this time.

The **Chairman**. And that judge has the power to exercise capital punishment?

Judge **Weber**. Yes, sir.

The **Chairman**. The second district court of appeals—is that the intermediate court between your trial courts and the supreme court of the State?

Judge **Weber**. Yes, sir. We have mandatory jurisdiction to hear every appeal from all the courts in the district.

The **Chairman**. And they have to go through your court before they go to the Supreme Court?

Judge **Weber**. Yes, sir. The court of appeals in Ohio hears about 9,000 cases a year and the Supreme Court hears about 400 to 500 cases on the merits.

The **Chairman**. I see. Judge Weber, at present you are a judge on the Second District Court of Appeals of Ohio. You served approximately 21 years as a common pleas judge of Greene County, OH. Prior to that, you were a judge of the Fairborn mayor's court.

Now, with this extensive background, would you please tell the committee what you consider to be the prerequisites for a just and a fair judge?

Judge **Weber**. My categorizing of the attributes that make a just and fair judge, Mr. Chairman, are, first, patience, kindness, and understanding. Second, I would list enthusiasm because, as a general jurisdiction judge, you hear many controversies that may seem to the general public of little importance. But to the litigants themselves, they are of extreme importance, so you must maintain an enthusiasm to try each case with the very best ability that you have.

You must have respect for the system of justice, the Federal system and the State system. You must have self-respect and you must respect every person that you come in contact with. You must be fair; you must be firm.

You must seek education and continual learning because if you do not, you stagnate and are unable to justly determine disputes in this fast-moving, modern society. You must have commonsense and concern. And last, and maybe the most important, you must have a passion to determine the truth and the true law. Once that is determined, then the answer to a given problem or grievance is easy to arrive at.

The **Chairman**. Judge, in response to a portion of the committee questionnaire concerning judicial activism, I believe you stated, "I have served as a constitutional judge elected by the people for almost 24 years."

The people do elect in your State, do they not?

Judge **Weber**. Yes, sir. I am running for office at this present time.

The **Chairman**. I see. [Continues reading:]

> For 21 years, I exercised general jurisdiction, and for the last 3 years general intermediate appellate jurisdiction. As such, under our concept of government, of the people, by the people and for the people, my duty and authority were directly derived from the people in the same manner as any legislator or elected executive.
>
> In my view, as such a judge I had equal authority to represent the people under the rule of law, as did a legislator or any elected executive, and a right and duty to determine the common law.

Judge, do you feel that this same concept applies to a Federal district court judge?

Judge **Weber**. No.

The **Chairman**. Why not?

Judge **Weber**. No, sir, I do not. My judicial judgeship on the State level is set forth in the Constitution. I am elected by the people. I am directly responsible to the people.

As a Federal district judge, I am at least twice removed from the people. I am appointed by the people's elected representatives, who are elected by the people. Second, article III of the U.S. Constitution limits the authority of the Federal judiciary.

The Federal district judge is not even mentioned in article III. The Federal district judge is a creature created by this Congress, and the authority and the jurisdiction of a Federal district judge are created by this Congress. And I believe a Federal judge must be limited by the jurisdiction given to the Federal judge, he or she, by this Congress.

The **Chairman**. Judge, you also informed the committee, "Trial courts should decide the issues before them in each individual case, and the judgment should be limited to the parties over which the court had jurisdiction in a particular case. It should be a precedent in other controversies only when the facts and the subsequent controversies are the same."

Judge, based on this statement, would you give the committee your thoughts on the proper application of stare decisis in constitutional law?

Judge **Weber**. Stare decisis, in my opinion, is a very important principle of constitutional law and it is necessary to achieve equal justice under the law. I believe it goes without saying that an inferior court—and I hate to use that word inferior because I feel the trial courts of this country are the most important courts.

But, anyway, they owe obedience to what the superior courts say. Therefore, the trial judge is bound by the dictates of the Supreme Court and of the intermediate appellate court. Stare decisis, to me, is extremely important to the trial judge because it limits his discretion.

A trial judge is given large measures of discretion to interpret the statutes under which he or she operates, and also to apply and determine facts. I would say that it is extremely important that a judge be consistent and, to me, that is what stare decisis means is consistency.

An example: I should consistently give continuances for valid reasons that the attorneys and the parties would know about. I should not give continuances to one firm or another on a different basis than I would continue cases of any lawyer or litigant.

Another example is that in setting bonds or imposing sentences, I should, when the facts are the same, impose evenhanded sentences to all persons, not because they are represented by a particular lawyer or a particular idea. To me, that is the importance of stare decisis in the trial court.

It is not so much this great theory of constitutional law that I bow to my superior courts and follow what they tell me the law is. But I feel that in the everyday workings of a trial court, it is most important that a trial judge grants equal protection of the law to all people; that sentences are equal as nearly as possible, realizing that every human being that comes into the courtroom is a unique individual, has a unique problem, and that therefore there are no two cases exactly the same.

But there are general principles that I refer to as stare decisis that tell me, "judge, be consistent and be evenhanded as you dispense justice."

The **Chairman**. Judge, would you have any hesitation in imposing capital punishment if the law so provided and the jury found the man guilty?

Judge **Weber**. I have taken an oath to uphold the Constitution of the State of Ohio and the laws of the State of Ohio. The laws of the State of Ohio require the imposition of capital punishment in the proper set of circumstances. I would follow the law without hesitation.

The **Chairman**. Have you ever had occasion to give a sentence of capital punishment?

Judge **Weber**. Yes, sir, but it was overturned. I have been a judge long enough that I have had my sentences overturned.

While I did not physically sign the judgment or pronounce the sentence in the case, as presiding judge of the Court of Common Pleas of Greene County, OH, I approved the sentencing report as to form and made no objection to the report's recommendation that the death sentence be imposed. The trial judge considered this report along with the other materials presented at the sentencing hearing and imposed the capital sentence. The sentence would not have been given but for the recommendation of the sentencing report, therefore, I have always considered that I was responsible for the sentence and that the sentence was my sentence as well as that of the trial judge.

The **Chairman**. But you would not have any hesitation, as I understand it, to impose a sentence if the jury so found?

Judge **Weber**. Under the law, I would have no hesitation under the rule of law and under the statutes of the State of Ohio to impose whatever penalties they demand.

The **Chairman**. Judge, thank you very much.

Judge **Weber**. Thank you, Mr. Chairman.

[Subsequent to the hearing, the following material was submitted for the record:]

JUDGE HERMAN J. WEBER,
Fairborn, OH, October 2, 1984.

Hon. STROM THURMOND,
Chairman, U.S. Senate Committee on the Judiciary, Washington, DC.

DEAR SENATOR THURMOND: Thank you for permitting me to appear before the Committee on the Judiciary on Wednesday, September 26, 1984.

After reflecting upon my testimony, I find it necessary to qualify and explain my answer to one of your questions, and I respectfully request that the following qualification and explanation be made a part of the record of my confirmation hearing.

As I recall your question, it was, "Have you ever imposed a sentence in a capital case?" I immediately answered, "Yes, but it was later rescinded."

Under Ohio law, this answer was technically correct because aggravated murder, formerly First Degree Murder, is a capital offense regardless of whether death may be imposed as a result of the conviction thereof. See: *State v. Henry* (1983), 4 Ohio St. 3d 44.

If the question was, "Have you ever imposed the death penalty in a capital case," then I must add the following qualification to my answer.

It has been inculcated into my character that moral responsibilities are as binding as legal responsibilities and that I must honor my moral obligations with the same diligence as I honor my legal obligations unless the two come into conflict with each other, whereupon I must comply with my legal obligation.

I was faced with such a conflict in January, 1961, when, after being sworn in as Common Pleas Judge for Greene County, Ohio, for the full term commencing January 1, 1961, one of the first cases assigned to me was a First Degree Murder case which was set for jury trial February 20, 1961. One of my first judicial acts was to order the drawing of the special jury required by Ohio law in First Degree Murder cases. The Ohio death penalty was believed to be constitutional and enforceable in February, 1961. I was, thus, confronted with the conflict between my obligation taught me from childhood that I should not kill and my legal obligation to follow the rule of law of the State of Ohio.

At first, I deluded myself with the thought that the jury would nullify my legal responsibility to impose the death penalty. As we proceeded through the pre-trial process, it became clear that the State of Ohio had a very strong case and probably would be successful in obtaining a guilty verdict without the recommendation for mercy.

It was therefore, incumbent upon me, in order that I could justly preside over this case, to decide whether I could, if required by law, impose the death penalty. To make this decision, I did much soul searching and spent several sleepless nights. When the particular defendant was before me in the courtroom, I would look at him; living, breathing and talking; and, in my mind, impose the death sentence upon him. Having done so figuratively, at night I would imagine the moral impact upon me and all who were involved in the matter when that sentence would be executed. I concluded that the effect upon me in that event would be substantial and very unpleasant.

Both parties were rightly concerned with my attitude and the answer to my conflict. If I would not impose the death penalty as required by law under any circumstances, I could not fairly judge the case and would be required to recuse myself. As the trial approached, it became imperative that I finally reach a conclusion, either recuse myself or be prepared to sentence the defendant to death if required by law. For one last time, I visualized that I sentenced the defendant to death, and after hours of deep consideration concluded that I would not recuse myself from the case. The next day I informed the parties of my deliberations and my conclusion that I would not recuse myself from the case. A few days later, much to my surprise and relief, the State moved to amend the indictment to Second Degree Murder, the defendant entered a plea of guilty and was sentenced to life imprisonment. Later, the Governor of Ohio commuted the sentence to First Degree Manslaughter.

After this experience, I know that I could apply the rule of law in all cases and be true to my oath of office without reservation.

In 1970, I was assigned, along with my colleague Judge Dan Aultman and Judge Howard Goldsberry from Ross County, Ohio, to a three judge panel for the purpose of deciding a capital case in which the defendant was indicted for abduction resulting in death. It was in our discussions during our deliberations on various motions in this case, that I learned that when the law requires the imposition of the greatest sanction, the death penalty, that it is not the sole responsibility of the sentencing judge, but the responsibility lies with the *whole court* and more precisely with the whole of society including the legislative, executive and judicial branches of government. It is not the responsibility of the judicial branch alone. I believe that one cannot be absolved of the responsibility for an act by simply washing one's hands.

In 1974, an execution type murder was committed in Greene County, Ohio. Three individuals were charged in a joint indictment of Aggravated Murder with specifications. One of the defendants agreed to testify against the other defendants. Judge Aultman was assigned the case. He conducted the jury trial of one of the defendants. The jury returned a verdict of guilty and guilty of the specifications on November 25, 1974. A new trial was denied on December 26, 1974. Under Ohio law at that time, a sentencing hearing before the judge without a jury was required. If at the hearing it would be established that certain statutory mitigating circumstances existed, the judge would be required to sentence the defendant to life imprisonment. If the mitigating circumstances were not established, the judge was required to impose the death penalty. As part of this process, the Greene County Adult Probation Department would investigate and prepare a pre-sentence report. This report would conclude with a recommendation for sentence. In 1974, I was the administrative judge of the general division of the court and in charge of the supervision of the Adult Probation Department.

After the verdict in Judge Aultman's case, the other defendant was assigned to my docket for trial. Once again, I was responsible to determine a capital case.

On December 30, 1974, the State of Ohio agreed to waive presentation of any evidence on the specifications contained in the indictment and withdrew them from consideration by the court; whereupon, the defendant waived trial and entered a guilty plea to aggravated murder. The defendant was sentenced by me to life imprisonment immediately.

The sentencing in Judge Aultman's case was scheduled for January 6, 1975. The only information I had received concerning the defendant in the case assigned to me came from the parties during pre-trial conferences and hearings conducted by me in connection with the case. After I had sentenced the defendant on December 30, 1974, in the case assigned to me, the completed sentencing report prepared for the hearing in Judge Aultman's case was presented to me for my comments to the probation department as to its form and the department's recommendation. A copy of the report was also given to the parties. I approved the form of the report and entered no objection to the recommendation that the death penalty be imposed.

The sentencing took place in my courtroom and the death penalty was verbally imposed by Judge Aultman. The judgment was filed January 16, 1975. After the judgment was filed on January 16, 1975, Judge Aultman and I discussed the merits of the case for the first time. I reminded him of our conclusion reached in the 1970 case. Further, for the first time, I informed him of the fact that after I had disposed of my responsibilities in my case, that I had approved as to form the report of the adult probation department, moreover entered no objection to the recommendation it contained and therefore, we shared the responsibility for the death sentence as the Court of Common Pleas of Greene County, Ohio. This case was reviewed by the Ohio appellate courts and was affirmed, however, the sentence was modified to life imprisonment as a result of the ruling in *Lockett* v. *Ohio* (1978), 438 U.S. 586, which held that death could not be inflicted as punishment under Ohio law.

Therefore, while I have not physically signed a judgment sentencing an individual to death, as the administrative judge in 1974, the presiding judge in 1975, and a member of the Court of Common Pleas of Greene County, Ohio, I have always considered myself responsible for such a sentence.

Thank you for your kind consideration of my request to qualify and explain part of my testimony and for the gracious and dignified manner in which you presided over the hearing.

Sincerely,

HERMAN J. WEBER.

The CHAIRMAN. We are glad to have you with us.

Mr. Rodriguez, will you come around, please? Mr. Rodriguez, do you have any family or friends here you would like to introduce?

TESTIMONY OF JOSEPH H. RODRIGUEZ, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Mr. RODRIGUEZ. Yes, sir, I would. I have my wife, Barbara, with me; my daughter, Lisa, who is a practicing attorney in the State of New Jersey; and a former partner and friend, Joel Korin, also an attorney from the State of New Jersey.

The CHAIRMAN. We are glad to have them with us.

Mr. Rodriguez, I believe you informed the committee that a court should rarely impose itself upon other institutions. Under what circumstances and under what standards would you determine that your court had a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. RODRIGUEZ. Sir, I think the reference that is being made there is that a court should—I guess the word would be almost never—attempt to impose itself upon an institution where in doing so it would require a constant administration of that institution because I do not think they are equipped to do it. I do not think they do it efficiently.

What therefore occurs is a sense of entanglement between the judiciary and a function of Government that leads to more problems than perhaps it solves. And it is in the inability to efficiently administer that I think the courts should rarely involve themselves in administration of an institution.

The CHAIRMAN. Mr. Rodriguez, there are those that allege that during your tenure as public advocate of the State of New Jersey, you used your office to pursue very broad social reforms rather than to right the wrongs of specific individuals. How do you respond to this criticism?

Mr. RODRIGUEZ. Sir, I think that criticism does not understand the mission of my office and the oath I took as public advocate of the State. I have, as public advocate, a broad legislative mandate to function in the public interest. I do as a cabinet officer for Governor Kane.

I think the actions that I have taken publicly have certainly been sufficiently supported by those who have seen what I was doing. In essence, sir, what I do with this very unique post is follow the mandates of our legislature.

Now, there are some who do not agree with that mandate but there is an orderly process by which the legislation can be changed. I do not feel that I, after taking an oath of office, should be the person to change the legislative mandate.

As for what those issues are, the issues that I have been involved in mainly have had the support of the government of the State of New Jersey, which is the government that I serve.

The CHAIRMAN. Mr. Rodriguez, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislation history?

Mr. RODRIGUEZ. I think if, in fact, I can reflect on, I hope, the words of Senator Bradley on what my functions have been in the State, if, in fact, there is a community that has looked to me for some guidance, the only way I can give that guidance any respect is to strictly comply with the law and follow the law because that is what gives stability to their growth.

I have always attempted to fully, to the best of my ability, follow the law, and I certainly would intend to do so; as a judge more so because I think the confidence in the system and the ability of people to know what it is you really stand for has to be one which is the Constitution of the United States and not what my personal whims or wishes may be. I think that is what brings confidence to the judicial system.

The CHAIRMAN. Mr. Rodriguez, do you believe that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people?

Mr. RODRIGUEZ. I do, sir. I believe that the powers of the Federal Government are those that were given to it by the States. And to the extent it was not given, that power remains and resides within the States, and that each State certainly has the ability, within the confines of what the Federal Constitution says, to move for the well-being of its own community, but certainly not one to attempt to infringe upon the reservation of its own power or necessarily to feel that the Constitution could be interpreted to whatever the wishes might be that were not actually granted by the States.

So I really look at it as the Constitution is something to be honored, to be properly interpreted, but not to be rewritten by the judge. I think we do have a proper forum in our society to make the changes that are necessary in keeping with the three branches of Government.

I have always believed that and, in doing so, I have aggressively attempted to keep the powers where they essentially belong, and I hope it is in doing that that has brought to me a certain amount of respect if, in fact, there is respect because in order to have that respect, I have to show respect, and showing respect is not to rewrite it to what I believe because I could be wrong.

But I know I am right when I read and comply with what I understand the Constitution says. I have never had that kind of a problem. I believe that there is a place for the Constitution, and I believe the powers that were not granted reside within the State.

The CHAIRMAN. Now, you heard me say a few moments ago that some judges have taken over running school districts, hospitals, and other State institutions. And I have not found any power in the Constitution for them to do that. How do you feel about that?

Mr. RODRIGUEZ. Well, I think what has been occurring is that there is a collision of responsibilities when that occurs. No. 1, there may be a social pressure that the court then feels that it should interpret within the Constitution.

My position is that once that is done or if they intend to do that, then they become involved in the administration of a delicate social policy which may infringe upon the rights of the legislature which is duly elected to create the policy. A court should rarely involve itself in serious questions of policy or the critical details of our economy because they are not the efficient forum to do it.

When they do so, and they cannot do it efficiently, they ruin the confidence or they destroy the confidence that there should be in the judicial process because it is not the forum to administer institutions.

So they should not intrude upon the policy questions that are uniquely within the legislative ability. When it occurs, you have that collision, and that collision is what causes all the media print with respect to the judiciary and the legislature clashing. They should avoid that.

The CHAIRMAN. Some Federal judges have lost the respect of the people and those who understand constitutional law and many members of the bar by usurping authority which they clearly do not have under what we would call judicial activism.

How do you feel about judicial activism?

Mr. Rodriguez. I always feel that law has a capacity for growth, but it grows within its legitimate borders. I do not believe that under what I understand to be judicial activism—it is that area where there is the collision of granted powers to the judiciary as it intends to infringe upon the elected powers of the legislature.

I do not believe they should intrude in that. It is that intrusion—that is the activism that I believe causes the tremendous concern. They should not do that. They are not the efficient forum. The matters that come before them are maybe not explored to the full extent through witnesses and experts to charge out into a massive policy change.

It is really not the forum for that kind of policy direction. That forum is the duly constituted legislative forum either in the State or in the Congress of the United States.

The judge has to have the courage to maintain that very delicate balance because it is the balance under which he is working. If he takes an oath to respect the office, he has to pledge to maintain that balance. To the extent that they infringe upon it, I think they usurp power.

The Chairman. Mr. Rodriguez, what are your views of the primary purpose of the criminal justice system?

Mr. Rodriguez. The various concerns of the criminal justice system is, one, of course, to deter crime. No. 2 is to protect society and, to the extent that it can, to rehabilitate those who have been caught up in the criminal justice system.

The Chairman. Would you have any hesitancy in imposing capital punishment if the jury so found and if the law provided it?

Mr. Rodriguez. None at all, sir, because I think that goes to the answers that I have been trying to give. I think the main respect has to be to the law, to the duly constituted law. And if it is there, it is not within my power to rewrite it.

The Chairman. Would you hesitate to impose capital punishment if the jury so found?

Mr. Rodriguez. If the law were duly constituted, no, sir.

The Chairman. I think that is all the questions I have. Thank you very much.

Mr. Rodriguez. Thank you.

The Chairman. We have a letter here from Emma Navajas-Soufront on behalf of the Governor of Puerto Rico, I believe, endorsing your appointment. Without objection, it will go in the record.

[Material submitted for the record follows:]

Puerto Rico Federal Affairs Administration,
Washington, DC, September 26, 1984.

Hon. Strom Thurmond,
Chairman, U.S. Senate Committee on the Judiciary, Washington, DC.

Dear Mr. Chairman: As the representative of the Governor of Puerto Rico, the Honorable Carlos Romero Barceló, it is my duty to visit mainland communities with large concentrations of Puerto Ricans. As a result of my frequent visits to the State of New Jersey, I have had the honor of meeting Joseph Rodríguez, whose name is currently before the Senate Committee on the Judiciary for consideration for a District Court Judgeship in New Jersey.

On many occasions, I have been able to personally witness Mr. Rodríguez' demeanor. Under all circumstances, he has demonstrated a wise, calm and balanced attitude toward the problems he has confronted. In his dealing with the community, he has shown a marked understanding of their mores, problems, and aspirations and has always displayed great interest in their improvement. His approach to the many issues which affect our community has been analytical, and at the same time humane. I have observed Mr. Rodríguez' desire to achieve an equilibrium between the application of the law and the legal principles in which we were trained and the social factors which make the law a living science. Not only have I been able to observe these traits personally, but have heard many community members extol these same traits of Mr. Rodríguez character.

Mr. Chairman, without hesitation or reservation of any kind, I respectfully encourage the Senate Committee on the Judiciary over which you so ably preside, to confirm Joseph Rodríguez as Judge to the District Court of New Jersey.

Sincerely,

EMMA D. NAVAJAS-SOUFFRONT, J.D.,
Director.

Mr. **RODRIGUEZ**. Thank you, sir.

The **CHAIRMAN**. Mr. Aquilino, will you come around?

Without objection, a résumé of yours will go in the record.

Mr. Aquilino, the Customs Court Act of 1980 provides for the U.S. Court of International Trade. This court has jurisdiction over any civil action against the United States arising from Federal laws governing import transactions.

What difficulty, if any, do you foresee in meeting the challenge of this specialized court?

TESTIMONY OF THOMAS J. AQUILINO, JR., NOMINEES, JUDGE, U.S. COURT OF INTERNATIONAL TRADE

Mr. **AQUILINO**. Mr. Chairman, I think the most serious challenge that that particular court faces is living up to the principles of the first rule of practice of that court, which is to give citizens, enterprises and communities a speedy and inexpensive resolution of their disputes at a time when our trade laws are becoming ever more complex.

That is the challenge, it seems to me, that judges of that court have to deal with. I know this Congress itself is very concerned with the length of time and the amount of money it takes to resolve these ever increasing and more complex trade cases.

The **CHAIRMAN**. Mr. Aquilino, do you have any recommendations for changes in the Customs Court Act that would benefit the Court of International Trade?

Mr. **AQUILINO**. At this moment I do not, Mr. Chairman. That act was enacted in 1980. I believe that it gives the court the necessary tools and powers to carry out its very important responsibilities in analyzing and deciding the many issues that arise in the area of international trade.

The **CHAIRMAN**. Mr. Aquilino, Justice Harlan, in his famous dissent in *Plessy* v. *Ferguson* in 1896, referred to our Constitution as a color-blind Constitution. Would you agree with this characterization?

Mr. **AQUILINO**. I do.

The **CHAIRMAN**. And what does that mean to you?

Mr. **AQUILINO**. I do indeed agree with that characterization of Justice Harlan in dissent, and it means to me, Senator, quite simply that the Constitution of this country guarantees equality to all people.

The **CHAIRMAN**. I hold in my hand a copy of a letter sent to Mr. Fielding, signed by a number of U.S. Senators, endorsing you. Without objection, that will go in the record.

[Material submitted for the record follows:]

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington DC, April 6, 1984.

Mr. FRED F. FIELDING,
Counsel to the President,
1600 Pennsylvania Avenue NW., Washington, DC.

DEAR MR. FIELDING: We are aware that Thomas J. Aquilino, Jr. is presently a candidate for Judge of the United States Court of International Trade in New York. We are writing to express our endorsement of Mr. Aquilino for this judgship.

Mr. Aquilino's extensive litigation experience includes his involvement in three major Supreme Court cases involving the constitutionality of state assistance to religious schools. In addition, he assisted in representing Senators Helms and Buckley and Congressman Hyde in the McRae case in which he defended the constitutionality of the Hyde Amendment. Furthermore, he defended the New York statute protesting the role of religion in placement of children for foster care in Wilder v. Bernstein.

Mr. Aquilino's demonstrated professionalism and advocacy skills as well as his background in international law, leaves no doubt that he is a qualified candidate. We urge you to consider him as quickly as possible.

Thank you for your attention to this matter.

Sincerely,

JEREMIAH DENTON.
JESSE HELMS.
CHARLES GRASSLEY.
ORRIN G. HATCH.
JOHN P. EAST.
PAUL LAXALT.

The CHAIRMAN. Is there anything else you would like to say?

Mr. AQUILINO. Yes, Mr. Chairman. I wonder if I may introduce my wife, Edith, who is in the back, along with my sons, Christopher, Philip, and Alexander.

The CHAIRMAN. We are glad to have your family here with us. Do you have any other friends here you want to mention?

Mr. AQUILINO. Not today, sir.

The CHAIRMAN. Well, thank you very much.

Mr. AQUILINO. Thank you, sir.

The CHAIRMAN. That concludes our hearing and we now stand adjourned.

[Whereupon, at 11:41 a.m., the committee was adjourned.]

BIOGRAPHIES

EDITH H. JONES

NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT

Birth: April 7, 1949, Philadelphia, PA.

Legal residence: Texas.

Marital status: Married to Sherwood O. Jones; two children.

Education: 1967-71—Cornell University, B.A. degree; 1971-74—University of Texas, J.D. degree.

Bar: 1974—Texas.

Experience: 1974 to present—Andrews & Kurth, associate (1974-82), partner (1982 to present).

HERMAN J. WEBER

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF OHIO

Birth: May 20, 1927, Lima, OH.

Legal residence: Ohio.

Marital status: Married to Barbara Lee Rice Weber, two children.

Education: 1946-49—Otterbein College, B.A. degree; 1949-51—Ohio State University, College of Law, J.D. degree.

Bar: 1952—Ohio.

Military service: 1945-46—U.S. Navy.

Experience: 1952—Private practice, Fairborn, OH; 1953-59—Weber & Hogue, partner; 1959-61—Weber, Hogue & McCarthy, partner; 1961-82—Judge, Common Pleas Court, Greene County, OH; 1982-present—Judge, Second District, Court of Appeals of Ohio.

JOSEPH H. RODRIGUEZ

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEW JERSEY

Birth: December 12, 1930, Camden, NJ.

Legal residence: New Jersey.

Marital status: Married to Barbara Marriner, four children.

Education: 1949-50—Niagara University; 1952-55—LaSalle University, A.B. degree; 1955-58—Rutgers University, School of Law, LL.B. degree.

Bar: 1959—New Jersey.

Military service: 1950-52—U.S. Army.

Experience: 1957-82—Brown, Connery, Kulp & Wille, partner (1969-1982); 1972-74—Chairman, State Board of Higher Education, New Jersey; 1974-79—Chairman, State Commission of Investigation; 1982 to present—Public Advocate of New Jersey (also Public Defender, State of New Jersey).

THOMAS J. AQUILINO, JR.

NOMINEE, JUDGE, U.S. COURT OF INTERNATIONAL TRADE

Birth: December 7, 1939, Mt. Kisco, NY.

Legal residence: New York.

Marital status: Married to Edith Berndt Aquilino, three children.

Education: 1957-59—Cornell University; 1959-60 and 1961-62—Drew University, B.A. degree; 1960-61—University of Munich, Germany; 1965-66—Free University of Berlin, Germany; 1966-69—Rutgers University, School of Law, J.D. degree.

Bar: 1972—New York.

Military service: 1962-65—U.S. Army.

Experience: 1969-71—Law clerk, Hon. John M. Cannella, U.S. District Court, Southern District of New York; 1971 to present, Davis, Polk & Wardwell, associate.

CONFIRMATION HEARING ON HOWARD D. McKIBBEN

TUESDAY, OCTOBER 2, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Laxalt.

Staff present: Robert J. Short, chief investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

We meet this morning to consider the nomination of Judge Howard D. McKibben, of Nevada, to be U.S. district judge for the district of Nevada. We are very pleased to have him with us.

Please stand and be sworn, Judge McKibben.

Do you solemnly swear that the testimony you will give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge McKibben. I do.

The Chairman. We are honored today to have our two distinguished Senators from Nevada here. We would be glad to hear from them at this time. Senator Laxalt, we will hear from you first.

STATEMENT OF HON. PAUL LAXALT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator Laxalt. I thank the Chairman. First of all, I would like to express my deep appreciation and that of Senator Hecht as well, to you, Senator Thurmond, Senator Biden, and my fellow colleagues on this committee for enabling this confirmation hearing to occur at this time. Frankly, we would not have sought to expedite this confirmation if it were not for the fact that we are approaching a grave judicial crisis in the State of Nevada.

This crisis can greatly be alleviated by the confirmation this year of Nevada District Judge Howard D. McKibben.

It gives me great pleasure to introduce to the committee a nominee of such excellent qualifications. In my judgment, Howard McKibben has the integrity, the legal knowledge and ability, professional experience, and, most importantly, the judicial temperament necessary to distinguish himself as a member of the Federal judiciary.

Judge McKibben received his bachelor's degree from Bradley University. Shortly thereafter, he earned a master's degree from the University of Pittsburgh. In 1967 he was awarded a law degree from the University of Michigan Law School.

His legal career has been equally distinguished. He began practicing law in Nevada. While engaged in private practice, he also served as the deputy district attorney for 2 years. In 1971 he was elected to be the district attorney for Douglas County. He served ably in that post until 1977, when he was appointed to the State judiciary. As a State court judge, he earned the respect of both prosecutors and defense attorneys.

His understanding, patience, and courtesy are well known in our State and have made him one of the most highly respected members of the Nevada bar.

Prior to making my recommendation to the President that he nominate Howard McKibben, we conducted a thorough review of the qualifications of more than a dozen distinguished members of the Nevada bar who were candidates for this position. I am confident this nominee understands the proper role of the judiciary in our scheme of government. I am sure that it will be of great interest to this chairman that Judge McKibben is a strict constructionist by philosophy, a fair and evenhanded dispenser of justice by reputation, and a man who has the courage and ability to make tough decisions in the cases that will surely come before him.

So, Mr. Chairman, I have the honor and privilege to present Judge McKibben to you for your evaluation and consideration. I support his confirmation without reservation. He has been and will continue to be a credit to his family, the people of our State, and the legal profession which he so ably serves.

On a personal note, Mr. Chairman, let me say this: I can recall when a very young lawyer fresh from Michigan, came to Nevada to prospect the Nevada legal lode. During that time I had occasion to advise and consult Judge McKibben. Since then, I have watched his progress and I must say that I have been very proud of him. To be sure, this life of ours is full of trial and tribulation, however, we do have our happy moments; as far as this Senator is concerned, this is one of his more happy moments.

I thank the Chairman.

The CHAIRMAN. Thank you very much, Senator. We are delighted to have you here.

We will now hear from the junior Senator, Senator Hecht.

STATEMENT OF HON. CHIC HECHT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator HECHT. Thank you, Senator Thurmond. I certainly echo Senator Laxalt's remarks. I have known Judge McKibben for some time. He is a man of impeccable integrity. He has served with distinction. He is an outstanding family man. He represents what is good about America. He is a young man, and he has many years to serve our great country.

I certainly endorse his appointment. Thank you, Mr. Chairman.

The **Chairman**. Thank you.

Senator **Laxalt**. At this point, Mr. Chairman, I think it would be appropriate to acknowledge the presence of the judge's wife, Mary Ann.

The **Chairman**. We are very pleased to have him introduce his family or friends.

Mr. **McKibben**. This is my wife, Mr. Chairman.

The **Chairman**. We are glad to have you with us.

I assure you that her appearance will not handicap you.

I have a few questions now that will not take over 5 minutes.

Without objection, we will place the résumé in the record.

TESTIMONY OF HOWARD D. McKIBBEN, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEVADA

The **Chairman**. At the present, you are a district court judge, I believe, for the Ninth Judicial District of Nevada. The district courts, as I understand, out there have original jurisdiction in felony, gross misdemeanor, and juvenile cases and in civil cases where the amount in controversy exceeds $1,250. The district judge also has the power to issue extraordinary writs, including writs of habeas corpus, and to hear all appeals from justice court.

Judge, you have served in this capacity for approximately 7 years. Is that correct?

Judge **McKibben**. That is correct.

The **Chairman**. I am confident that you are knowledgeable of your State laws. I want to ask you this. Does that court have the power of death in capital punishment cases?

Judge **McKibben**. If it is a jury proceeding, the jury would make the determination. Then the judge would pronounce the death penalty. That is correct.

The **Chairman**. But you do have the power of capital punishment?

Judge **McKibben**. That is correct.

The **Chairman**. Unlimited civil jurisdiction?

Judge **McKibben**. That is correct.

The **Chairman**. That is similar to what we call circuit courts, too, in South Carolina. I was a circuit judge before I became Governor.

I am just wondering if you feel you would have any difficulty in making the transition from State court to Federal court.

Judge **McKibben**. Though I am sure there are going to be some problems in the transition, the functions and responsibility that I have had as a district court judge in the State are quite similar. I am confident that those that I will be facing as a Federal district judge—the rules of civil procedure that we have in Nevada were patterned after the Federal rules of civil procedure, so I would not anticipate that, at least from an evidentiary standpoint and the civil procedure standpoint, that we are going to have any great difficulties in the transition.

Obviously, I am going to have to familiarize myself with the Federal law. I am not an expert in that area. I believe strongly in judicial education. I taught at the National Judicial College for several years. I kept myself abreast of the law. I am sure I am going to be burning the midnight oil for months to come to try to familiarize myself with the codes and make that transition, but I am prepared to make whatever sacrifices there are to do that. I welcome that opportunity.

The CHAIRMAN. I understand that since you have been on the bench you have written to members of your local bar and encouraged them to commit a portion of their time to representation of indigents so that everyone could achieve equal justice under the law regardless of their station in life. You are to be commended for this action.

Have members of the bar responded to this appeal?

Judge MCKIBBEN. I would say that of the ones that I wrote to, Senator, approximately a third have responded either in writing or verbally to me. I think it is a judge's responsibility to encourage members of the bar to participate, to represent those who are disadvantaged, that do not have the opportunity to hire lawyers themselves. If we are going to achieve equal justice under the law—and, of course, that is the inscription you see on the Supreme Court building here, as I noticed yesterday when I walked past it—I think we have to try to enforce the provisions of Canon Two of the Code of Professional Conduct established by the American Bar Association.

My personal feeling is that we should encourage both through judiciary action and the legal community voluntary participation by members of the bar and not have to rely on some type of public program or funds that are expended at taxpayers' expense. I think it is critical that judges take the lead in attempting to encourage members of the bar to devote a certain portion of their time, regardless of whether it is a new attorney coming in to practice or one that has been around for 30 years. I feel that they have the responsibility to devote a portion of their time to representing people that are disadvantaged.

The CHAIRMAN. I have always felt that way myself. This is my 30th year in the Senate. I was practicing law in Aiken, SC, after I left the Governor's office. We did not have any public defenders then. It was always customary that the judge would appoint a lawyer to defend someone who did not have a lawyer. They took care of the situation and, I thought, handled it quite well. I have no special objection to public defenders, but I really think lawyers, like doctors, have an obligation to the community, as other people should have in other professions to try to help people. The biggest pleasure I get out of life is helping people.

It seems to me that we have an obligation to our humankind to try to do that. I am very glad to see that you have taken an interest in that.

Judge, one of the characteristics of judicial activism is said to include a tendency by the judiciary to impose itself on the other institutions in the manner of an administrator with continuing oversight responsibilities. Would you give the committee your views on this criticism?

Judge MCKIBBEN. I responded, Senator, to that in section 3 of the questionnaire which I submitted to the committee. I consider that to be one of the fundamental problems involving the concept of separation of powers under Articles 1, 2, and 3 of the Constitution. I am concerned about the role of the judiciary that it has played in years past, particularly during the last 10 to 15 years, in involving itself in administrative responsibilities and invading either the province of the legislature or the executive.

I simply do not think that judges are qualified to administer programs that are non judiciary in nature. I cited as an example in my response some cases in which judges will take over the operation and maintenance of a prison or a jail. I simply do not think that judges are qualified or competent or have the expertise or the necessary resources to undertake such responsibilities.

Judges do have the power of contempt. If there are constitutional abuses, then the judiciary has an obligation to act and to respond. But when they do so, I think they have to be careful in fashioning orders and limiting the jurisdiction that they undertake so that they will not get involved in oversight responsibilities. I simply do not think that they are equipped to do that.

I am very careful in fashioning any orders or decisions or judgments that I render and ensuring that I will be able to enforce those judgments. I have no intention of injecting myself into the administrative scheme of things or invading the province of the legislature.

I think basically the problems stem from the fact that there is some distrust among the various branches of Government. It seems to me that members of the judiciary should have confidence that the legislature and the executive will fulfill their constitutional mandates just as the judiciary will. If they have that type of confidence, perhaps they will not have to get involved in oversight responsibilities.

The CHAIRMAN. Some judges have taken over school districts. Some of them have taken over hospitals and other institutions. We think that under the Constitution they really do not have that authority to do it.

Judge McKIBBEN. I agree with that, Senator.

The CHAIRMAN. But when the judiciary takes that initiative and nobody stops them, they just keep going. And that is what we call judicial activism, where they really do not have authority to do so. We have got three separate branches of Government. The legislative branch makes the law. The executive branch administers the law. The judicial branch interprets the law. I think we ought to stay within our own spheres.

Those who think there should be more Federal power—and that is a fight. It is a fight we are having right here in this Senate right now. It is holding us up, as to whether we are going to expand power, bring more power to Washington, to the Federal Government, or leave it with the States and with the people, where the Constitution put it.

I am a great believer in federalism, the kind that President Reagan believes in: Leave with the States the powers that were reserved to them under the Constitution.

Judge McKIBBEN. I agree, Senator. I think it is unwise to ignore the doctrine of judicial restraint.

The CHAIRMAN. I do not think I have any other questions. I just want to say that you could not have been endorsed by two finer men, Senator Laxalt and Senator Hecht. They are both held in high esteem here. Senator Laxalt is acknowledged to be the man closest to the President of any Member of the Congress, Senate or House. He is a man of great ability and integrity. We appreciate his being here.

We congratulate the State of Nevada for sending Senator Hecht to us, too. He has done a fine job here. We are very proud of him.

I do not know of anybody coming in as late as you are now where they would get the consideration that you are going to get, because we have already finished hearing the judges. But when Senator Laxalt and Senator Hecht requested this, we just had to do it. We are glad to do it. We wish you well on the bench.

Judge McKIBBEN. Thank you very much, Senator.

The CHAIRMAN. We now stand adjourned.

[Whereupon, at 9:55 a.m., the committee was adjourned.]

BIOGRAPHY

HOWARD D. McKIBBEN

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEVADA

Birth: April 1, 1940, Virginia, IL.

Legal residence: Nevada.

Maritial status: Married to Mary Ann Scott McKibben, two children.

Education: 1958-62—Bradley University, B.S. degree; 1962-64—University of Pittsburgh, master's degree of Public Affairs; 1964-67—University of Michigan Law School, J.D. degree.

Bar: 1969—Nevada.

Experience: 1967-71—George W. Abbott Law Office, associate; 1969-71—Deputy district attorney, Douglas County, Nevada; 1971-77—District attorney, Douglas County, Nevada; 1977 to present—District court judge, Ninth Judicial District Court, State of Nevada.

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